2005

The Challenge of Motive in the Criminal Law

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U/C sees the Δ, thin & haggard w/ swollen hands

Δ paces nervously on corner for 10 minutes

U/C approaches Δ and asks for "horse"

Δ nods in silent agreement

Δ takes $20 PRBM from U/C, goes into a hotel, emerges with two glassines of heroin, hands heroin to U/C, U/C walks away

Ghost observes entire transaction from car

A/O arrests Δ for 220.39

In SILA, Δ has no PRBM or heroin

† Assistant Professor of Law at St. John's University School of Law, Jamaica, New York, 2004. To borrow a sentence from the esteemed Professor Greenawalt, "[t]his piece explores a good deal more than it resolves, even to the author's satisfaction." Greenawalt, infra note 271, at 928. I wish to thank my colleagues for their time and thoughts: Dean Joseph Bellacosa, Charles Bobis, Christopher Borgen, Paul Kirgis, Michael Perino, Michael Simons, Brian Tamanaha, Robert Vischer, and Timothy Zick. I also thank the following participants at a workshop at the Northeast People of Color Conference in March 2004 at the University of Connecticut for their insights and encouragement: Alafair Burke, Lenese Herbert, Sanjay Chhablani, and Darren Hutchinson. I am also indebted to the assistance of my student research assistants: Jeffrey Glassman, Shannon Black, and Diana Neyman. Finally, all errors are solely mine.

INTRODUCTION

In the cryptic shorthand[1] typical of police and prosecutorial paperwork, the above narrative tells the basic story of a purchase of illegal drugs by an undercover police officer. Such a purchase is more commonly known as a "buy and bust" operation.[2] Across the United States, buy and bust operations occur frequently as federal and state law enforcement officers wage the war on drugs.[3] In the twenty-first century, the stakes in the longstanding war on drugs are high as law enforcement and national security agencies join forces to confront the disturbing ties between terrorism[4] and illegal narcotics.[5]

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1. A guide to abbreviations (in order of their appearance): U/C means undercover officer; Δ means defendant; "horse" is slang for heroin; PRBM means pre-recorded buy money and refers to paper currency whose serial numbers are recorded prior to the drug purchases so that they can easily be identified and introduced as relevant physical evidence if recovered by police upon arrest; ghost refers to undercover officers who are assigned to serve as backup to the purchasing undercover officer during the buy and bust operation; A/O means arresting officer; 220.39 refers to the section in New York's Penal Law for Criminal Sale of a Controlled Substance in the Third Degree; and SILA means search incident to lawful arrest.

2. Actual buy and bust operations can vary in scale and complexity, ranging from the quick street trade where small amounts of drugs are allegedly purchased for personal use to closed door transactions that involve much greater quantities of drugs and money and many more interactions over a longer period of time. As one observer quipped, buy and bust operations, also known as B & Bs, are the "bread-and-butter of street-level drug enforcement." Michael Massing, The Fix 60 (1998).

3. In 1968, presidential candidate Richard Nixon coined the exact phrase and launched the "war on drugs." See Dan Baum, Smoke and Mirrors: The War on Drugs and the Politics of Failure 11 (1996) (depicting the war on drugs as a political ploy to garner votes). It would continue to be a central theme of his presidency. See David Corn, Eric Gravley, & Jefferson Morley, Drug Czars We Have Known, The Nation, Feb. 27, 1989, at 258 (noting July 14, 1969 as the date when President Richard Nixon first sought to eradicate the national drug problem).

4. See Phin MacDonald, What about Bin Laden's Drug Empire, Wash. Times, Oct 17, 2001, available at http://www.mapinc.org/drugnews/v01/n1784/a03.html?1402 (last visited Nov. 8, 2004) (indicating that although there is no concrete evidence linking Bin Laden's drug profits to the Sept. 11 attacks, a critical part of the War on Terrorism includes cutting off the funding of terrorists via the drug trade); Edward T. Pound & Chitra Ragavan, "Tears of Allah":

In addition to being a weapon in the arsenal of law enforcement, the buy and bust operation also tells an interesting story about motive in the criminal law. This may not be obvious at first glance. However, this article uses the simple street sale[6] to demonstrate how the criminal law suffers from its ambivalent attitude towards the role that motive should play.

Because the simple street sale remains the predominant way through which illegal drugs arrive in the hands of individual buyers and addicts, law enforcement and hence the criminal law have had to and will continue to deal with the simple street sale. While the inherent transaction may be the focus of law enforcement due to longstanding policies to criminalize certain addictive drugs, jurisdictions

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Another Weapon in Osama bin Laden's War Against the West, available at http://www.usnews.com/usnews/news/terror/articles/heroin.htm (Oct. 4, 2001) (last visited Nov. 8, 2004) (discussing Bin Laden's alleged involvement with the distribution of a highly potent form of heroin in the United States); James Rosen, Drug Trade Filled Coffers of Taliban, Bin Laden Group, Minneapolis Star Trib., Sept. 30 2001, at 21A (linking money generated through American heroin sales to Osama Bin Laden).

5. In some contexts, there are fine scientific definitions for the terms drugs and narcotics. See, e.g., N.Y. Penal Law § 220.00(7) (2005); N.Y. Pub. Health Law §3306 (2005). However, this article will use the terms drugs and narcotics interchangeably to mean illegal drugs, especially those of an addictive nature. See The American Heritage Dictionary 427, 830 (William Morris ed., 2d. college ed. 1982) (defining drug as a narcotic, especially one that is addictive, and narcotic as a drug that dulls the senses, induces sleep, and becomes addictive with prolonged use).

Marijuana is excluded from the article's consideration because both popular attitudes and penal laws regard marijuana as a lesser drug than cocaine or heroin. Compare N.Y. Penal Law § 221.35 (2005) (categorizing the sale of any quantity of marijuana as a Class B misdemeanor) with N.Y. Penal Law § 220.39 (2005) (categorizing sale of narcotics such as cocaine as a Class B felony). For a discussion indicating that marijuana legalization has gained more favorable support in recent years, see generally USA Today/CNN/Gallup Poll, available at http://www.usatoday.com/news/nation/2001/08/23/marijuana-poll.htm (last visited Dec. 7, 2004).

6. This article uses the phrase *simple street sale* to refer to those transactions at the final stage of distribution whereby illicit drugs move into the hands of individual drug abusers. Often, such transactions occur physically on the public streets, hence the term. They usually involve modest amounts of drugs and money such as two glassines of heroin and twenty dollars. In addition, the participants in the transactions are typically strangers to one another with no prior communication or relationships.

continue to struggle in deciding which participants in the simple street sale to condemn for what offenses and the appropriate relative punishments. For example, the defendant in the above narrative engaged in what is commonly known as *steering* behavior and may even be referred to as a *steerer*.[7] Should his acts be regarded as a crime? If so, what crime? Sale, or possession? Sale and possession? Or something else altogether? What would be an appropriate punishment? These same questions are also applicable to the other two participants.

Conceptually, this challenge is nothing new. The questions, "Whom to punish?" and "How much to punish?" are the very foundational issues that have long occupied punishment theorists. In order to achieve proportional justice, it is necessary to contemplate these questions. What is interesting about the context of the simple street sale is that asking these two questions leads to consideration of motive. Each of the three participants in the above narrative surely had a different reason for their participation. But should motive determine their offense? Should motive determine their penalty?

Traditionalists answer no. Generations of scholars of the criminal law have learned that motive is irrelevant in the criminal law.[8] It is especially irrelevant with respect to liability for a crime.[9] Recently though, several criminal law scholars and legal philosophers have begun to debate the role of motive in the criminal law.[10] Interestingly, both

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7. There are numerous terms that describe with technical precision various participants in a simple street sale. See infra note 116 and accompanying text. This article uses the terms *steerer* and *steering* to refer to any individual who connects drug addicts to drug dealers.

8. See Jerome Hall, General Principles of Criminal Law 88 (2d ed. 1960) ("Hardly any part of penal law is more definitely settled than that motive is irrelevant."); see also Douglas N. Husak, Motive and Criminal Liability, 8 Crim. Just. Ethics 3, 3 (1989) ("This thesis is endorsed, sometimes with minor qualifications, by almost all leading criminal theorists.").

9. See Husak, supra note 8, at 3; Whitley R.P. Kaufman, Motive, Intention, and Morality in the Criminal Law, 28 Crim. Just. Rev. 317, 317 (2003).

10. Professor Kaufman describes the recent trend as a "countermovement" led by Professor Husak against the orthodox view that motive is irrelevant. See Kaufman, supra note 9, at 317. The short piece by Professor Husak was

traditionalists and critics concede that contrary to the famous irrelevance maxim, motive has been relevant for a long time in some significant instances in the criminal law.[11] Where they disagree is whether motive should assume an even greater role.[12] Traditionalists and critics are currently engaged in defining the appropriate parameters for considerations of motive in the criminal law.[13]

Against this backdrop of discussion about motive and the criminal law, jurisdictions have approached the challenge of criminalizing simple street sales in a variety of

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groundbreaking. See supra note 8.

In addition, there are other figures in this countermovement. See, e.g. Alan Norrie, 'Simulacra of Morality'? Beyond the Ideal/Actual Antinomies of Criminal Justice, in Philosophy and the Criminal Law 101 (Antony Duff ed., 1998); Guyora Binder, The Rhetoric of Motive and Intent, 6 Buff. Crim. L. Rev. 1 (2002) (dismissing the irrelevance of motive maxim as either a descriptively false statement or only trivially true by definition).

Some of the discussion has been inspired by the rise of contemporary issues such as hate crimes and cultural defenses. See, e.g. Jeffrie G. Murphy, Bias Crimes: What Do Haters Deserve?, 11 Crim. Just. Ethics 20, 21-22 (1992); Martin B. Margulies, Intent, Motive, and the R.A.V. Decision, 11 Crim. Just. Ethics 42, 44-45 (1992); Adam Candeub, Comment, Motive Crimes and Other Minds, 142 U. Pa. L. Rev. 2071 (1994). For two court opinions that draw opposite conclusions about the constitutionality of motive elements in hate crime statutes, see the Supreme Court opinion in Wisconsin v. Mitchell, 508 U.S. 476 (1993) (finding it is constitutional for a state to use motive in both offense definition and in sentencing) and the state opinion it overturned in Wisconsin v. Mitchell, 485 N.W.2d 807 (Sup. Ct. Wis. 1992) (declaring the hate crime statute is unconstitutional because of a First Amendment violation).

11. Longstanding exculpatory motives that eliminate criminal liability include self-defense in the use of physical force, necessity in the avoidance of greater harm and heat of passion. See Walter Wheeler Cook, Act, Intention, and Motive in the Criminal Law, 26 Yale L.J. 645, 661-62 (1917); Binder, supra note 10, at 48 (2002). Examples of inculpatory motives are specific intent crimes such as burglary and inchoate offenses like attempt and conspiracy. See Walter H. Hitchler, Motive as an Essential Element of Crime, 35 Dick. L. Rev. 105, 111, 113-14 (1931). See also supra text accompanying notes 42.

12. See, e.g. Hyman Gross, A Theory of Criminal Justice (1979); Husak, supra note 8; Norrie, supra note 10; Alan Norrie, Punishment, Responsibility and Justice (2000).

13. See, e.g. Martin R. Gardner, The Mens Rea Enigma: Observations on the Role of Motive in Criminal Law Past and Present, 1993 Utah L. Rev. 635 (1993) (advocating that motive should be limited to narrow defenses and not used in offense definition or in discretionary sentencing); Richard G. Singer, Just Deserts: Sentencing Based on Equality and Desert 81 (1979) (criticizing the relegation of motive to sentencing as both duplicitous and undesirable).

ways. Some have chosen to pay little attention to motive while others have done the opposite and over-accommodated it. This article focuses on the unique approach adopted by New York State known as the agency defense. This defense allows the defendant in our narrative, the steerer, to be treated as nothing more than a purchasing agent for his principal, the ultimate buyer[14] of the heroin. In order to be treated as an agent, a jury must conclude that the defendant is motivated into steering by a desire to help the undercover police officer. There must be no self-interest involved.

Once this motive is established,[15] status as an agent leads to an acquittal of the serious sale charges[16] on two distinct grounds. First, an agent cannot be guilty of any charge different from his principal. Secondly, an agent is merely giving to the principal what his principal already owns. He is not selling anything to his principal. The result of either line of reasoning is that the defendant is not guilty of sale and is only guilty of a relatively minor offense of criminal possession of a controlled substance.[17]

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14. The article uses the phrase *ultimate buyer* to refer to the participant in the simple street sale who purchases the drugs for his own use. See infra text accompanying notes 201-03. In this case, the undercover police officer is the ultimate buyer and hence, the principal. The identity of the principal as a member of law enforcement is not significant for the legal reasoning of the agency defense. Moreover, the term *ultimate* may indeed be relative in that after attaining the glassines of heroin, the principal could immediately give them to yet another person later that same evening. If the principal faced a criminal charge of sale, he could then bring his own agency defense too.

15. See infra text accompanying notes 193-201.

16. In New York State, criminal sale of a controlled substance is an offense that can be classified as one of five different level felonies. The particular level felony for any one particular sale varies with the weight and nature of the controlled substance being sold. See N.Y. Penal Law §§ 220.43, 220.41, 220.39, 220.34, and 220.31 (2004). Prior to December 2004, the potential jail terms for a first time offender ranged from one to three years for the lowest level felony to fifteen years to life for the highest level felony. See Barry Kamins, Sentencing Guides, in Gould's Criminal Law Handbook of New York (2004).

The most recent legislative changes have reduced the terms to one to one-and-a-half years for the lowest level felony to eight to twenty years for the highest level felony. New Sentencing Chart for Drug Offenses Under Rockefeller Drug Law Reform, available at http://www.communityalternatives.org/articles/sentencing_chart.html (last visited Feb. 23, 2005). See also infra text accompanying notes 243-61.

17. Again, because this article and the agency defense are focused on simple

New York State's agency defense is intriguing in the discussion of motive and the criminal law because its litmus test is expressed directly in terms of a defendant's motive. Indeed, the use of the term *motive* is quite remarkable. There are numerous classic examples[18] of where the criminal law is substantively focusing on a defendant's motive; however, these examples do not do so explicitly. In this way the agency defense appears to be a progressive example of where judges and juries are openly using a defendant's motive to determine his liability for a crime. This appearance, however, is misleading.

While effective for some fortunate defendants, the ability to be successful with agency defense in New York is unpredictable. Trial courts do not consistently grant requests for juries to be instructed on the agency defense and also give nonuniform instructions. This lack of coherence and consistency is easily explained by the basic fallacy of the agency defense. The reality of the drug trade, especially on the street, is that steerers are not purchasing agents for the ultimate buyers. Indeed, the notion that buyers acquire fiduciary representation from a stranger in the span of a brief and illicit conversation is both absurd and humorous. Steerers do not act out of some selfless desire to help a complete stranger. Steering a drug deal is not akin to the altruistic act of giving directions in your neighborhood to someone who is lost. While a charming concept, a principal-agency relationship between a steerer and the ultimate drug buyer is simply not true. The truth is that these defendants steer drugs to support their own habits. This fundamental lack of truth is at the root of the inconsistency.

Perhaps this attempt to explain the inconsistent application of the agency defense approaches too much

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street sales of relatively minor quantities of drugs such as two glassines of heroin, the possession offense is only a misdemeanor. See N.Y. Penal Law § 220.03 (2005). There is no jail term required; instead, non-jail penalties such as community service, drug treatment programs, and probation are common. See Kamins, supra note 16.

18. Examples include specific intent crimes like burglary and defenses like self-defense. See infra text accompanying notes 43-44.

unforgiving literalism. The agency defense may be similar to other valid, well-intentioned attempts to describe in legal terms what goes on in real life.[19] Such attempts do not need to be perfectly accurate to be legitimate. Some may be comforted by this half-hearted excuse for the agency defense; however, this article posits that the incoherence and inconsistency of this legal fiction is inexcusable and unnecessary. There is no need for yet another legal fiction in the criminal law. While it does indeed address motive explicitly, the agency defense disguises the actual underlying empathy for the drug problems of steerers. Literally it claims to allow those who act out of selfless interest for their principals to escape criminal liability. In actuality, though, the agency defense allows those steerers who suffer from their own drug addictions and who act to satisfy their cravings to escape from liability.

The agency defense survives and thrives in New York State because it serves as a convenient political compromise for juries, judges, and legislators. Judges, juries, and legislators resist the honest consideration of a defendant's drug addiction and instead rely on the legal fiction of an agency defense. There are two reasons for their resistance. First, they have been unable to overcome the ambivalence and disagreement in the criminal law over the role motive should have in determinations of liability and punishment. Second, Americans are torn on the question of whether drug addiction should eliminate liability for a crime and/or reduce the severity of a sentence. They are concerned about public safety. In addition, drug addiction is an example of a motive for which there are serious problems with both its provability and its moral potency. Because of these problems, there is no community consensus on whether the criminal law should accommodate drug addiction. Thus, the criminal law does not accommodate drug addiction, at least not

19. For example, transferred intent is another legal fiction in criminal law that allows for liability for an accidental death by "transferring" guilty mens rea directed at another target to the dead victim. See Wayne R. LaFave, Criminal Law §§ 6.3(d) & 6.4(d) (4th ed. 2003).

openly. This article concludes that a more honest and broader acceptance of motive in the criminal law will lead to elimination of the agency defense fiction and the adoption of more flexible sentencing and liability determinations. Greater flexibility would allow for appropriate consideration of motives like drug addiction and the achievement of proportional justice without the costs of unpredictable and incoherent legal precedent. Logically, such improvements will ultimately create greater respect for the rule of criminal law.

Part I of the article joins the evolving discussion of motive in the criminal law generally. To support the overall conclusion that motive should figure more prominently in the criminal law, part I proposes several novel ideas. First, although some other scholars are fixated with whether motive should be limited to determinations of *either* liability *or* punishment, this article proposes that decision makers should be free to consider motive when determining both. Second, part I explains that not all motives are the same. Indeed, motives such as self-defense, insanity, and heat of passion clearly differ in terms of their provability and moral potency. While some may be more easily proven, others possess greater moral potency. Because of these critical differences, part I of this article proposes that motives which are easily proven and possess high moral potency be part of liability determinations while motives that present proof problems or low moral potency be restricted to sentencing. Third, part I ends with a sweeping recommendation to reform the overall attitude about motive in the criminal law. Far from being irrelevant to the criminal law and unworkable, motive should be thought of as essential. The criminal law should not limit itself to consideration of a few select motives; instead, it should welcome the challenge of incorporating defendants' various motives. With the freedom of multiple forums and the guidelines of provability and moral potency, an effective criminal law built around motive can be successfully developed.

Part II then turns to the simple street sale and New York's agency defense and the intriguing lesson they offer for considerations of motive in the criminal law. Part II begins by analyzing the challenge of defining the offenses and punishments for various participants in the simple street sale and how the agency defense was designed to address this challenge. It continues with the history of how federal courts led state courts in the adoption of the judicially created agency defense and how Congress then eliminated it by statute in adopting the distribution approach to the war on drugs. In conclusion, part II describes instances of legal inconsistency produced by the agency defense in New York.

As a contrast to the fiction of the agency defense, part III turns to the reality of the street drug trade. The article finally concludes in part III by taking two positions. First, the agency defense is nothing more than a poorly disguised ruse to suspend criminal liability for drug addicts who may steer and help other drug addicts in completing drug transactions on the streets. It should be abandoned in New York State. Second, a more honest and effective criminal law would allow for flexible and explicit consideration of more motives including drug addiction. Because drug addiction may feature problems of provability and low moral potency, it is best to replace the agency defense with mandatory consideration of addiction at sentencing for now. If Americans ever achieve moral consensus on the problem of crime motivated by drug addiction, then perhaps at that future point elimination or mitigation of criminal liability may be possible.

The narcotic buy and bust operation has long been a central weapon in the arsenal of law enforcement agencies fighting the war on drugs. Despite its longstanding history, jurisdictions have yet to adopt satisfactory approaches to the conundrum of how to penalize each participant in the simple street sale. Efforts such as the agency defense in New York State have largely failed because of the great tension within the criminal law of how to accommodate the motives of those defendants with

whom we empathize. This tension is certainly not unique to narcotics sales prosecutions, but the story of the simple street sale provides a valuable glimpse at how the criminal law needs to go further in addressing the current constraints on motive. Only by significantly shifting attitudes towards motive can we hope to build a more meaningful and effective criminal law.

I. THE ROLE OF MOTIVE IN THE CRIMINAL LAW

A. *The Irrelevance Maxim*

As Jerome Hall so pithily stated in 1960, "[h]ardly any part of penal law is more definitely settled than that motive is irrelevant."[20] Many scholars are quick to clarify that this terse maxim refers to the irrelevance of motive for determinations of liability while leaving intact its pertinence for determinations of punishment.[21] Earnest defenders of the maxim further qualify the pithy phrase: "The orthodox doctrine holds that motive is irrelevant to criminal liability unless it is specifically made relevant as part of the definition of a crime . . . or unless there is an established criminal defense that requires the establishment of a motive (e.g., duress)."[22] Although stated for the purpose of defending the irrelevance maxim, such qualifications are basically a concession that specific intent crimes, inchoate crimes, and the defenses of provocation, insanity, necessity, and self-defense have long regarded the motives of a defendant in determining criminal liability. So, while it may make a well-settled and pithy statement, the declaration that motive is irrelevant is not even descriptively true. Both defenders and critics of the maxim largely agree on this point; however, they loudly disagree as to whether motive should or should not be *even more* relevant to the criminal law than it currently is.

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20. Hall, supra note 8, at 88.
21. See e.g., Kaufman, supra note 9.
22. Kaufman, supra note 9, at 318.

B. What Is Motive?

In order to understand their normative disagreements better, let's elaborate on exactly what motive is. Motive is a concept that at first seems to lend itself easily to definition. It is most simply the reason a defendant does what he does. Upon deeper reflection though, the task of defining motive quickly becomes more complicated, especially when juxtaposed against the concept of intent or mens rea. This is an interesting juxtaposition because while both motive and intent refer to mental states, one has been deemed irrelevant to criminal liability while the other is central to it.[23]

In this debate on motive numerous efforts have been made to define it. These efforts divide into three groups. Some have defined motive as completely different from intent while others have argued that motive is a particular type or sub-category of intent. Still others, like Douglas Husak, have offered more functional definitions. The first group regards intentions as "cognitive states of mind, like expectations or perceptions of risk" while describing motives as "desiderative states," meaning "desires, purposes or ends."[24] In other words, "motives *explain why* a person acted, while intentions *describe what* action was performed."[25] While appealingly simple, this definition renders the maxim of irrelevance untrue.[26] It is untrue that the criminal law *never* considers why a person acts in determining liability.[27]

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23. See Husak, supra note 8, at 5 ("The exceptional significance Anglo-American criminal law attaches to intention stands in stark contrast to its (alleged) complete disregard of motive.").

24. Binder, supra note 10, at 4.

25. Husak, supra note 8, at 6; see also Gross, supra note 12, at 111 ("[A] motive can be distinguished from an intention as an explanation of an act and not a description of it.").

26. See Binder, supra note 10, at 4.

27. See infra text accompanying notes 43-44. "One might well take the position that it would be better to abandon the difficult task of trying to distinguish intent from motive and merely acknowledge that the substantive criminal law takes account of some desired ends but not others." LaFave, supra note 19, § 5.3(a), at 259 (4th ed. 2003).

The second group of efforts is inapposite. Motive is not a different mental state from intent; rather, it is a sub-type of intent. Motive is defined as the "ulterior" intention or "the intention with which an intentional act is done."[28] Although at first this definition rings true, this definition ultimately offers a meaningless distinction between motive and intent. Because people act in a "chain of intention," every intent is a motive for a prior or earlier intent.[29] For example, a defendant pulls the trigger of a gun in order to make the bullet enter a victim's body in order to kill the victim in order to steal his possessions, etc.[30] As a result, the only distinction between motive and intent are insignificant moments of time where "[a]n intention ceases to remain a motive only when it becomes immediate."[31] If there is such spare distinction between motive and intent, then normatively the statement that the criminal law should be engaged only with the most immediate of intents is weak. Critics have harshly ridiculed this second definition of motive. They contend that because motive and intent are essentially the same, the statement that motive is irrelevant to the criminal law can only be true as a tautology where motive is defined as all those intentions that have been deemed, for one reason or another, irrelevant.[32] In contrast, all those that have been deemed relevant are designated as intent or mens rea.[33]

Finally, the third group of efforts rejects the approach of juxtaposing motive against intent or mens rea. Instead, these definitions of motive focus on the mental function that motive represents. According to Douglas Husak, motives may "be understood as a 'polymorphous collection

28. Glanville Williams, Criminal Law: The General Part § 21, at 48 (2d ed. 1961), quoted in Husak, supra note 8, at 5.

29. See id.

30. See Husak, supra note 8, at 5-6.

31. Husak, supra note 8, at 6.

32. See Antony Duff, Principle and Contradiction in the Criminal Law: Motives and Criminal Liability, in Philosophy and the Criminal Law, supra note 10, at 156, 173 (refers to this as "definitional truth"); Husak, supra note 8, at 6 (refers to this as a "vacuous tautology").

33. See infra text accompanying note 44.

of action initiators.'"[34] These motives may be further intentions, reasons, or other undefined mental states; their categorization is not important.[35] Hyman Gross offers that "a motive . . . is a reason for doing the kind of purposeful act that calls for an explanation and that is done by the actor for the sake of something else."[36] Having a motive for an action is simply believing that "some end will be furthered by performing it, and . . . [wanting] or [desiring] . . . to further that end."[37]

This article adopts this third functional definition of motive because it strives to define motive independent of intent and mens rea. Freed from any need to compare to intent or mens rea, the functional approach comes closer to defining motive as it is understood by laypeople.[38] This connection to lay usage of the term *motive* is valuable because it supports one key argument for enhancing the role of motive in criminal law. That argument is the importance of aligning legal norms to social norms in designing effective criminal laws.[39] Furthermore, a functional definition allows for easy comprehension.

C. Motive Is Already Relevant

Understanding motive as the "action initiator" behind a defendant's acts, it is clear that motive already influences determinations of liability. First, on a very basic level, the presence or absence of a motive may be helpful in determining whether a defendant acted intentionally or

34. Christine Sistare, Agent Motives and the Criminal Law, 13 Soc. Theory & Prac. 303, 306 (1987), quoted in Husak, supra note 8, at 8.

35. See Husak, supra note 8, at 8.

36. Gross, supra note 12, at 111.

37. P. Grice, Motive and Reason, in Practical Reasoning 168 (Joseph Raz ed. 1978), quoted in Husak, supra note 8, at 8.

38. In the American Heritage Dictionary motive is defined as "an emotion, desire, physiological need, or similar impulse acting as an incitement to action." The American Heritage Dictionary 517 (William Morris ed., 2d college ed. 1991).

39. See Tracey L. Meares, It's a Question of Connections, 31 Val. U. L. Rev 579, 582 (1997) (theorizing that the law is least likely to be obeyed when legal norms do not reflect social norms and most likely to be obeyed when they do).

unintentionally.[40] This is because not every act of a defendant is accompanied by a cognizable "action initiator."[41] Indeed, arguably only intentional acts are done with a motive in mind. Acts for which a defendant may have no motive may be those unintentional acts committed recklessly or negligently.[42] Thus, motive is already of tremendous significance in determining a defendant's mens rea and therefore his criminal liability.

In addition to this basic consideration of motive, traditional criminal law also focuses on motive in special limited circumstances. For example, common law has long provided that a defendant may assault another person if the defendant was doing so in order to defend himself from "the use or imminent use of unlawful physical force by such other person."[43] Although jurisdictions may vary with respect to the fine details of this right to self-defense, they all share the need to analyze the reason or "action-initiator" behind the defendant's acts. Only if the reason fits within a narrowly defined category is the defendant then absolved of his otherwise criminal assault. This traditional right to self-defense clearly determines liability based on motive.

Another longstanding defense that operates in a similar fashion is necessity. Necessity requires that a defendant commit a crime because of a need to avoid an even greater harm. Still a third common law defense that

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40. See Husak, supra note 8, at 8. In addition to being evidence of an intentional mens rea, motive is also highly regarded as powerful circumstantial evidence of overall guilt: "[o]n the procedural side, a motive for committing a crime is relevant in proving guilt when the evidence of guilt is circumstantial . . . ." LaFave, supra note 19, § 5.3, at 256.

Also as any amateur sleuth can advise, good detective work includes searching for someone with a motive when trying to determine the perpetrator of an unsolved crime. See Gross, supra note 12, at 103.

41. See Gross, supra note 12, at 110-11.

42. See id.

43. N.Y. Penal Law § 35.15 (2005) ("A person may . . . use physical force upon another person when and to the extent he or she reasonably believes such to be necessary to defend himself, herself, or a third person from what he or she reasonably believes to be the use or imminent use of unlawful physical force by such other person . . . .").

considers motive is mistake of fact where a defendant lacks an illicit motive because he acted under mistaken factual belief. All three of these defenses conclude that it is unjust and perhaps ineffective to inflict punishment on defendants who act without an evil motive and instead act because of fear or a belief that their acts are privileged.[44]

Beyond these defenses, the common law also uses motive as an offense element of specific intent crimes. The classic example of a specific intent crime is burglary where a defendant's purpose in breaking and entering a premises must be to commit a further crime once inside. Once again, unless the defendant's reason or "action-initiator" fits within this narrowly defined category, that defendant will not be guilty of the crime of burglary. Modern examples of where motive is an offense element are stalking and hate crimes. The presence or absence of a particular motive is a determinative factor.

What is interesting about these traditional defenses and offenses is that in order to steer clear of the irrelevance maxim, motive is not identified as such. The term *motive* is not used and sometimes it is even replaced by another term or phrase such as *specific intent*. *Specific intent* could easily be defined as those motives that are relevant for the criminal law, notwithstanding the otherwise accurate and pithy statement of motive's irrelevance. Some scholars have criticized this refusal to acknowledge the language and substance of motive in the criminal law. Because of their critical analyses, there are more open discussions of how motive already influences the criminal law, albeit only under special limited circumstances. With the modern examples of stalking and hate crimes, much of the

44. As Professor Gardner describes, these defenses developed in the evolution of the evil motive tradition in the common law. Affirmative proof of an evil motive used to be a prerequisite for criminal liability. However, as the modern concept of mens rea or intent became the dominant approach to offense definition, evil motives were relegated to the form of defenses like self-defense, necessity, mistake of fact, insanity, and infancy. That was also the historical point in time when the irrelevance maxim arose. Gardner, supra note 13, at 664-67, 694-95.

controversy has surrounded the flagrant use of motive in these criminal statutes.

D. Some Say Motive Should Not Be Relevant

Although it is not as starkly irrelevant as the original pithy maxim would lead scholars to believe, overall current criminal laws invoke the motives of defendants fairly infrequently. Defenders of the irrelevance maxim have provided several reasons for why motive should continue to play only a limited, as opposed to central, role in the criminal law. This article discusses two of these reasons. The first is that the criminal law must only take into account a small number of motives because of the need for effective social control. In addition to expressing the moral judgment of a community, the criminal law is also a utilitarian tool for regulating the future behavior of members of that community. If the criminal law were to accommodate every sympathetic motive, then many more defendants would either escape criminal liability or receive much-reduced sentences. Social control would be crippled. Thus, while not wholly consistent, the necessary compromise is to allow for the consideration of motive but only in those exceptionally sympathetic circumstances.[45]

The second reason not to expand the role of motive is the need to preserve the institutional and historical prerogative of legislatures in controlling the influence that motive should have in the criminal law. This argument rests on the belief that legislatures, as opposed to judges or juries or other law enforcement agents, are best suited to determine which motives should be singled out for particular inculpatory or exculpatory treatment in the criminal law. Because of the context of individual cases,

45. "[Critical theorists'] central argument is, rather, that once the law recognises the kinds of motive-based defence that our law already recognises, in accordance with its concern for individual responsibility, it has no good reason to deny more radical extensions to such defences: but such extensions would utterly undermine its role as an instrument of social control, and are for that reason . . . rejected." Duff, supra note 32, at 179.

courts are vulnerable to being preoccupied by the "poignancy"[46] of actual defendants and ignoring the "policy implications of an extension of the law."[47] In addition, it is more democratic for an elected body of representatives to handle collectively broad questions of moral condemnation rather than individual jurists who may be appointed as well as elected to their positions. Finally, use of the proscriptive legislative process advances the principle of legality.[48] For all these reasons, the conclusion is "that the legislative process, with its capacity for thorough consideration and debate of policy complexities, is the proper forum to shape all doctrinal aspects of the criminal law."[49] Thus, legislatures should be free to determine "what kinds of motives should make what kind of difference to criminal liability,"[50] while courts should

> attend only to the issue of whether the defendant's actions matched the law's definition of a crime. They will thus often have to attend to questions about what motivated the defendant. Because such motivational questions will often be relevant to her liability: but they must *not* attend to motivational factors that are not declared relevant by the law.[51]

Effective social control and legislative superiority are admittedly persuasive arguments for leaving the criminal law as it is, with limited consideration of motive in determinations of liability and sentencing. The reasons are even combinable in that there are arguably countless motives or action-initiators behind the acts of defendants and thus too many for legislatures to codify.[52] While persuasive though, they are ultimately not convincing.

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46. Gardner, supra note 13, at 746.

47. Id.

48. See id. at 745-47 (expressing a special concern for legality with retroactive abolition of justification defenses by courts).

49. Id. at 746.

50. Duff, supra note 32, at 174.

51. Id; see also Kaufman, supra note 9, at 318.

52. This was certainly the view of Jerome Hall, who strongly believed that motive belonged only in matters of sentencing. See Hall, supra note 7, at 162-63.

They can be overcome, at least in part, with more creative ideas on how to use motive in the criminal law. Even more importantly, excluding motive for the sake of effective social control and legislative competence comes at too high of a cost.

E. Why They're Wrong: Motive Must Be Relevant

Because the criminal law professes to be the means through which a community expresses its moral condemnation,[53] it should consider motive. Motive is essential because the reason why a defendant acts is important in assessing the moral culpability of his acts. Indeed, motive is at the core of our moral intuitions.[54] Hyman Gross has put forth four dimensions of moral culpability in his theory on criminal conduct: (1) intentionality, or more specifically, the extent of a defendant's intent with respect to the harm; (2) the nature or gravity of the harm; (3) the dangerousness of defendant's acts, or in other words, the reasonable expectation of harm; and (4) the legitimacy of the defendant's act under particular circumstances.[55] In this theory, the fourth dimension is the defendant's motive. According to Gross, an act must be culpable in all four dimensions in order for that act to be morally culpable at all.[56] If what a defendant

53. See George K. Gardner, Bailey v. Richardson and the Constitution of the United States, 33 B.U. L. Rev. 176, 193 (1953) ("The essence of punishment for moral delinquency lies in the criminal conviction itself. . . . It is the expression of the community's hatred, fear, or contempt for the convict which alone characterizes physical hardship as punishment."). Henry Hart has defined a crime as "[c]onduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community." Henry M. Hart, Jr., The Aims of the Criminal Law, 23 Law & Contemp. Probs. 401, 402-06 (1958).

54. The phrase *moral intuitions* was suggested to me by Professor Brian Tamanaha.

55. Gross, supra note 12, at 77-82.

56. Id. at 81 ("Just as there are no physical objects with only one dimension or two, so an act with only one, two, or three dimensions of culpability is not a culpable act at all. Culpable acts of less than four dimensions are like tables with length alone, or with length and width, but no height.").

did, on balance, was the right or legitimate thing to do, then the act is not morally culpable.[57]

To demonstrate the validity of Gross's theory, consider the pairing of two appellate opinions on willful, premeditated, and deliberate murder by Professor Joshua Dressler in his casebook.[58] The first case describes the death of Ronnie Midgett, Jr., an eight-year-old boy, from a beating by his intoxicated father.[59] This boy had been brutally beaten over a substantial period of time and was very poorly nourished and underdeveloped.[60] The Supreme Court of Arkansas upheld the conviction for intentional murder based on the father's intent to cause serious physical injury to his son.[61] A factual inverse, the second case deals with a defendant who shoots and kills his terminally ill elderly father, Clyde Forrest, during a visit to see him at the hospital.[62] In his statements to the police the defendant said the following: "I killed my daddy." "He won't have to suffer anymore." "I promised my dad I wouldn't let him suffer."[63] In this case, the Supreme Court of North Carolina affirmed his conviction for intentional murder based on sufficient evidence of intent to kill, premeditation, and deliberation.[64] The purposeful pairing is both clever and provocative. Without fail, it disturbs students because two vastly different killings are considered the same offense of intentional murder under the common law. Despite the explanation that both defendants possessed the necessary intent or mens rea required, some students inevitably protest the miscarriage of justice.[65] After all, isn't the criminal law supposed to be

57. See id.

58. Joshua Dressler, Cases and Materials on Criminal Law 249-56 (3d ed. 2003).

59. See Midgett v. State, 729 S.W.2d 410 (Ark. 1987).

60. See id.

61. See id.

62. State v. Forrest, 362 S.E.2d 252 (N.C. 1987).

63. Id.

64. See id.

65. See Dressler, supra note 58, at 255 n.3 (featuring the limericks of inspired law students who agreed and disagreed with the results in the two cases).

about moral condemnation? How could a son who acts out of love for his father be regarded as the moral equivalent of a despicable child abuser?

The point of these first year law students is not lost. If the criminal law is to reflect the moral judgment of a community, and if members of this community strongly consider a defendant's motive in assessing morality, then shouldn't the criminal law do so as well? Douglas Husak points to other important micro-communities in our everyday lives that include motive in their deliberations. "Nothing written by moral philosophers supports the unimportance of motive. It is doubtful that this feature of criminal theory is reproduced in other institutions in which rules are enforced, judgments rendered, and sanctions imposed. Schools, places of employment, and families all regard motive as crucial. Why should the criminal law do otherwise?"[66]

Consideration of motive is necessary to avoid the criminal law from becoming "a sterile exercise hinging guilt on descriptive states of mind without regard to claims of absent or mitigated moral blame."[67] Even more importantly, motive must be part of the criminal law in order to ensure greater adherence to the rule of law. Only through an alignment of social and legal norms can the criminal law truly achieve effective social control.[68]

It is important to note that the inclusion of motive as an essential consideration in the criminal law does not threaten the exclusion of other relevant factors. Gross's other three dimensions—intentionality, dangerousness, harm—and even other factors such as voluntariness should continue as prerequisites for moral culpability. Indeed, motive and these other factors may have complicating impacts on each other. As Gross explains, "the likelihood of harm may be affected by the actor's motive, and the same act done with one motive may be less dangerous than if

66. Douglas N. Husak, Philosophy of Criminal Law 144 (1987).
67. Gardner, supra note 13, at 742.
68. See Meares, supra note 39, at 582.

done with another."[69] Thus, motive is important on its own but also for its effects on the other three dimensions of moral culpability.

The current use of motive in the criminal law, while good, is not good enough. The criminal law needs to take motive into account in a more systematic and regular fashion. Only through a comprehensive inclusion of motive will the criminal law be a reflection of our moral intuitions. This reflection is essential to a just and equal rule of law.

F. A Workable Framework for Motive

A systematic inclusion of motive would be a vast improvement on current practices. However, as defenders of the maxim have expressed, there are concerns with effective social control and institutional competence. Thus, there is a need for a creative framework with thoughtful guidelines on how best to accommodate motive. This article suggests the following: (1) the use of multiple forums; (2) the assessment of each motive's provability and moral potency; and (3) a reform of our attitudes.

1. The Use of Multiple Forums

Concerns about effective social control and institutional competence can be met in a system where motive, good and bad, does not simply lead to extreme declarations of guilt or no guilt. The underlying assumption of both concerns is that motive can only affect critical decisions of liability. Because the stakes are fixed at such a high level, it is not practicable to have courts accommodating every sympathetic motive. Thus, the current criminal law opts to have legislatures determine only a few select motives that will enable defendants to escape criminal liability. Instead, the criminal law should allow motive a more prominent voice but not only in high-stakes questions of liability. Motive should also figure in

69. Gross, supra note 12, at 104-05.

other determinations such as sentencing, prosecutorial charging, and plea bargaining decisions. A decision maker, whether she is a prosecutor, a judge, a legislator, or a juror, should be free to consider a defendant's motive. As a result, some considerations of motive may not lead to avoidance of liability but instead may only mitigate or reduce a potential charge or sentence.

While these determinations are still critical for an individual defendant, the implications of sentencing and prosecutorial decisions are less consequential than liability decisions on a systemic level. This is particularly true with regard to the criminal law's all-important function as the moral arbiter of a community.[70] As Professor Kaufman astutely noted, "mitigating sentences or declining to prosecute does not send the same social message of approval of violations of the law."[71] By allowing for multiple forums, the criminal law will still be able to provide effective social control while also reflecting more honest collective moral judgment.

Indeed, one of the collateral benefits of a multiple forum system is the ability to react to motives that had not been anticipated by legislation and yet can be considered in other decisions such as plea bargaining or charging or sentencing. For example, legislatures are only now seriously contemplating the motive of euthanasia in criminal statutes. Prior to this, there was a long period of time in which many decision makers from judges to juries wanted to accommodate euthanasia but were handicapped by the gap in the law. Instead, during this interim time, a multiple forum system would allow decision makers to accommodate "new" or unique motives in less systemic, discretionary stages such as plea bargaining and sentencing.

This proposal of multiple forums for the consideration of motive builds on what already exists in our current criminal justice system. As stated earlier, in some limited instances

70. See Kaufman, supra note 9, at 333.
71. Id.

such as self-defense or specific intent crimes, motive is already the pivotal factor determining liability.[72] In addition, motive has traditionally figured into the sentencing decisions of judges and the charging decisions of prosecutors.[73] According to Professor LaFave, "the existence of a good motive on the part of the guilty person may be taken into account wherever there is room for the exercise of discretion . . . ."[74] Such room can be found in the arrest decisions of police officers, charging and plea bargaining decisions of prosecutors, sentencing decisions of judges, and even in post-sentencing matters of corrections officials, parole boards and probation departments.[75] This proposal is different from current practices in that it espouses explicit and direct considerations of motive.

This multiple forum approach is unlike the argument numerous scholars have had over choosing a *single* best forum for the consideration of motive. Some have pointed to sentencing as that forum. Professor Husak vigorously denounces such a practice as unprincipled. If a defendant's motive does not fit within the narrow categories that have long been recognized by traditional criminal law as bases for avoiding liability, the defendant is "then forced to resort to . . . 'unprincipled' means of evading liability, by relying on prosecutorial discretion or on such judicial 'charades' as manipulating the distinction between action and omission in order to reach the desired result."[76]

In contrast, Professor Gardner contends that sentencing is the proper place for consideration of motive for two reasons. First, sentencing avoids the danger of undermining the principle of legality: "Whatever actual punishment is ultimately applied, the offender knows well in advance of sentencing that it can be avoided simply by

72. See supra text accompanying notes 43-44.

73. See Kaufman, supra note 9, at 330 ("[T]he criminal law does not depart from morality so as to ignore motive altogether. Motive is relevant at the prosecutorial and sentencing stages.").

74. LaFave, supra note 19, § 5.3(b), at 260.

75. See id.

76. Kaufman, supra note 9, at 331-32 (describing Husak's critique of how the criminal law currently handles euthanasia).

not committing the criminal act."[77] Secondly, assessing a defendant's motive during sentencing is less distracting: "[O]nce the fact finder determines guilt, inquiry into offender motivation poses no risk of diverting attention from whether the offender committed the crime to digressions into why he might have done so."[78]

However, Gardner's position is not convincing. His first point about legality presumes that any criminal offense or defense that incorporates a particular motive as an element cannot be expressed with sufficient particularity and clarity. Although there is admittedly greater risk of legality problems with liability determinations than with sentencing, examples like self-defense and burglary demonstrate that such risk can be overcome. A very long history of development in the common law and in statutes has led to extremely precise and clear formulations.[79] Besides, motive is not more susceptible to legality problems than other sophisticated concepts such as accomplice or attempt liability. Even more compelling is the argument advanced by Husak that if certain motives are relatively more blameworthy than other motives, such differences should be publicly announced through legislation and not hidden in sentencing:

> The incorporation of motives into the substantive criminal law would publicize whatever significance motives are thought to have. For example, if an assault motivated by racial hatred is believed to be more reprehensible than an assault motivated by sexual jealousy, this judgment should be explicitly included in a criminal code. A properly drafted criminal code should provide effective notice. Statutes not only should identify objectionable conduct, but also should

77. Gardner, supra note 13, at 748-49.

78. Id. at 748.

79. See, e.g. N.Y. Penal Law § 35.15(2)(b) (2005) ("A person may not use deadly physical force upon another person under circumstances specified in subdivision one unless . . . he or she reasonably believes that such other person is committing or attempting to commit a kidnapping, forcible rape, forcible criminal sexual act or robbery.").

> draw whatever distinctions are necessary to indicate the extent to which conduct is blameworthy. The public is less likely to be informed of the relevance of such judgments as long as the evaluation of motives is reserved to the less visible decision of sentencing authorities.[80]

Advance notice, after all, is exactly what the principle of legality is all about.

As for Gardner's second concern, in his view motive is only a distraction because he defines it to be so.[81] He presumes that a determination of guilt does not involve considerations of why a defendant acted. Rather than being an independent reason to keep motive in sentencing, this concern about distraction illustrates a basic point of disagreement. Whereas Gardner regards motive as distracting, the proposed multiple forum approach is based on the premise that motive is of central importance in determining moral culpability.

The moral intuitions which include a consideration of motive are important in all phases of the criminal justice process. Thus, motive belongs not just in sentencing or just at trial but rather wherever moral judgment is required. It should shape the decisions of prosecutors, judges, juries, law enforcement officers, and legislatures at all phases of criminal justice from beginning to end.

2. An Assessment of Provability and Moral Potency

The framework of multiple forums builds on the current criminal justice system that already employs multiple forums.[82] However, what the current system lacks is a guide to what may be *the* most appropriate forum for any one particular case. As Professor Husak remarks:

> Why are such issues as whether the defendant succeeds in killing his victim, as opposed to failing in his attempt,

80. Husak, supra note 8, at 4.
81. See supra note 78.
82. See supra text accompanying notes 72-75.

> material to his liability but not to his punishment? Why are such issues as his stress, economic background, ignorance of law, inherited character, education, amount of temptation, or degree of complicity in the offense, material to his punishment but not to his liability? The writings of orthodox criminal theorists provide no principled answers to these questions.[83]

Equally absent is any helpful standard on when it makes sense for legislators to include motive in their definitions of criminal offenses or defenses.[84] It is important to fill these gaps because not every "action-initiator" is the same.[85] Not only are they different substantively, but they also vary in two critical features. The first is provability and the second is moral potency.

What is meant by provability? Provability refers to the ability to identify a defendant's motive and the ability to prove that motive beyond a reasonable doubt. These are two distinct considerations. For example, it may be difficult or even impossible in some cases to identify a defendant's motive. While admittedly this article thus far has discussed motive as if it were readily identifiable, one social scientist, Jonathan Casper, points out that is not often the case. Indeed, as he points out, sometimes a defendant himself may not even know why he committed a criminal act.[86] Other times, a defendant may have more

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83. Husak, supra note 8, at 3.

84. See Duff, supra note 32, at 175 ("[W]e must still ask whether there is a principled distinction between those kinds of motive that legislatures can properly make relevant to criminal liability (for some kinds of crime), and those that they should not make relevant . . . .").

85. See Husak, supra note 8, at 12 (concluding that much "remains to be done . . . [including] identify[ing] the best or the worst motives [and] describ[ing] the several conditions under which motives *should* be relevant to criminal liability").

86. Jonathan D. Casper, American Criminal Justice: The Defendant's Perspective 146 (1972). "The question of why some people engage in 'criminal' behavior is one that has long plagued societies and students of behavior. Many explanations and theories have been developed, none of which seem particularly fulfilling. It is too much to expect that criminals themselves—when asked, 'Why did you do it?'—will provide us with ready answers to the question. They, too, are quite confused about why they behave as they do and would welcome an answer."

than one identifiable motive.[87] This possible difficulty in identifying a defendant's motive has led some criminal law scholars to advise against the inclusion of motive in the criminal law.[88]

In addition to the ability to be identified, there is the question of whether motive can be proven or disproved beyond a reasonable doubt. It is one thing to be able to articulate or express what a defendant's motive may have been but quite another thing to be able to prove that motive in a court of law. Subject to the strict rules of evidence and the standard of beyond a reasonable doubt, this is not necessarily an easy task. Because motive is a mental state of a defendant, this task is based on drawing of inferences based on common-sense interpretations of tangible

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Id.

87. Professor LaFave highlights the complication of mixed motives. In such cases, a defendant may have acted in order to satisfy more than one identifiable motive. LaFave, supra note 19, § 5.3(a), at 259. If one motive provides a classic defense such as self-defense, the criminal law currently will disregard the other motives and will excuse the defendant's acts. Id. Picture an abused woman who killed her batterer because he was about to rape her forcibly. Under New York's self-defense rules, it does not matter that she also relished killing him because of her desire to seek revenge so long as when she did so, she was in imminent danger of being forcibly raped. See N.Y. Penal Law § 35.15(2)(b) (2005).

While these mixed motive scenarios are interesting, they do not present any serious obstacles to provability. So long as a defense or a sentencing guideline does not require that a good motive be the singular motive of a defendant, the presence of additional motives should be of no particular consequence. Interestingly, Professor LaFave uses the mixed motive situations as an illustration of how the irrelevance maxim is somewhat true. LaFave, supra note 19, § 5.3(a), at 259.

88. See, e.g. Kaufman, supra note 9, at 319.

> [T]he law must exclude motives for the sake of an effective and practicable system of criminal justice. Given the difficulty of identifying a person's subjective motive for an action, it would complicate adjudication tremendously to have to ask not only whether the person violated a criminal statute but also whether his or her motive for doing so was a good one.

Id.

> [T]o know the motives of a defendant would, arguably, require a vastly greater inquiry into the specifics of his or her character and his or her goals than an inquiry into the intention involved in the specific act. Such a psychological inquiry into the complexities of the question of character is to be avoided where possible.

Id. at 320.

evidence. Whether this task is doable will vary from case to case. Some supporters of the status quo limitations on motive have cited this varying ability to be proven as a reason not to extend its role in the criminal law. For instance, Professor Duff concludes that including motive as a factor in liability determinations opens the possibility for spurious claims and the convictions of innocent defendants.[89] Professor Kaufman agrees: "To allow such consideration [of motive] into judicial decisions would open a Pandora's box and create the possibility of jury or judicial 'nullification' of the criminal law, not to mention the enormous increase in unpredictability that such practices would no doubt create."[90]

However, the complications of proving motive and the variance of success are similar to those presented in proving or disproving the other all-important mental state of mens rea. Indeed, anytime that the criminal law is confronted with the task of judging a defendant's mental state, provability will require serious attention because mental states are simply not tangible and not transparent. The possibility of spurious claims and wrongful convictions is present with mens rea too. Yet, the criminal law has deemed such risks acceptable in including mens rea in almost all offenses and in limited inclusions of motive such as burglary and self-defense. There is no reason to believe that a broader inclusion of motive would invite adjudicatory disaster. At times, there will be lots of evidence to prove a defendant's motive beyond a reasonable doubt; at other times, there will very little. Insufficient proof of motive will lead to whatever necessary and arguably just result. For example, if the prosecution is unable to prove beyond a reasonable doubt that a defendant possessed the necessary inimical motive, then the defendant will be acquitted. Likewise, if a defendant is unable to prove that he did act out of duress, then he will be convicted. Professors Duff and Kaufman[91] fail to make

89. Duff, supra note 32, at 178.

90. Kaufman, supra note 9, at 320.

91. Professor Kaufman also worries about nullification of the criminal law,

the case that motive presents a particular vulnerability for our adjudicatory process.

Provability encompasses both the ability to identify and the ability to prove a defendant's motive. Certainly, provability will differ from case to case. However, in addition to variability among individual cases, certain classes of motives and/or offenses may be easier or more difficult to prove. For example, with a spontaneous intentional homicide, there may be much evidence in the moments immediately preceding the killing that reveal the defendant's motive. A contrasting example is a hate crime where an element of the offense is the racial animus of the defendant. Depending on the surrounding community, it is likely that politically incorrect expressions of racial animus are unacceptable such that evidence of such animus is largely concealed and difficult to gather.

Because each individual case and even whole categories of crimes and motives may vary as to their provability, the framework of multiple forums is particularly sensible. Each forum has a distinct standard of proof and therefore, certain forums may be more appropriate than others for particular cases or types of offenses and motives. For example, if self-defense motives are relatively easy to prove, then it makes sense to allow self-defense as a defense to liability. However, if euthanasia is a motive that is more difficult to prove, then arguably consideration of such a motive belongs in sentencing. Traditionally, sentencing is subject to a lower standard of proof and free from the evidentiary considerations of trial. Likewise, charging and plea bargaining decisions of prosecutors are less constricted.

In addition to the feature of provability, motives also differ in terms of their moral potency. This article uses the phrase *moral potency* to refer to the relevance that a motive may have as a reflection of the moral character of a defendant or his acts. This concept is borrowed from

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but his concern rests on the flawed premise that motive is somehow irrelevant and not part of the criminal law.

Professor Duff.[92] In the tragic story of Ronnie Midgett, Jr., his father's motive of relieving anger and stress by beating his young son over a prolonged period of time has high moral potency because it makes such a statement about his reprehensible moral character.[93] There is also high moral potency in the case of the devoted son who shoots his terminally ill father to death. Motivated by his love and desire to spare his father any further physical suffering, this defendant's motive demonstrates a good moral character or at least the absence of a bad one.[94]

What attributes for the ability of a motive to reflect the moral character of a defendant? In large part, moral potency depends upon the vigor of the community stance on any particular motive. For some motives, there may be strong and unified collective opinions that such motives deserve the full brunt of the criminal law. Such motives include vengeance and greed. For other motives, there may be equally strong and unified opinions that such motives should not be punished criminally. Examples include fear in the case of a duress defense or irrational anger in the case of a heat of passion defense.[95] Still other motives may inspire disparate opinions from the community such that there is a distinct lack of unanimity.[96]

The stronger and more unified the collective opinion is of a particular motive, the more likely that motive will be perceived as a statement about a defendant's moral character. The inverse is also true. The more tepid and divisive the community opinion is, the less likely that motive will be regarded as an important statement.

92. See Duff, supra note 32, at 177-78 (suggesting that legally significant motives be identified by asking what difference a motive may make to the moral character of the action or actor).

93. See supra text accompanying notes 59-61.

94. See supra text accompanying notes 62-64.

95. Heat of passion defenses are also sometimes called provocation defenses. Interestingly, the current criminal law is ambivalent about the stage at which provocation should be assessed. As Professor Husak noted, "[t]ypically, provocation is pertinent to liability in the law of homicide, but is material only to sentencing for all other offenses." Husak, supra note 8, at 3.

96. See infra text accompanying notes 275-77 (discussing the divided public opinion about drug addictions of defendants).

Whether a motive has high or low moral potency is important to consider as the criminal law seeks to be a just assessment of moral culpability.

Once again, the framework of multiple forums is particularly well suited. Because moral potency may vary, it makes sense to have the freedom to consider motive at different stages in the criminal justice process. If a motive has high moral potency, then it should be included in decisions about criminal liability. It may even be determinative of such decisions. As Professor Husak suggests, it may even be prudent in some circumstances to include such a motive in the definition of the criminal offense.[97] Because modern sentencing occurs within narrow guidelines, there is too little room within any one sentencing range to capture the high moral potency of such a motive.[98] On the other hand, if a community is undecided on the morality of a particular motive, then the low moral potency means that consideration of such motive should either be inconsequential or perhaps be limited to sentencing or plea bargaining decisions.

3. A Change in Attitude

The final recommendation is a sweeping reform of the attitude towards motive in the criminal law. Far from being irrelevant to the criminal law, it is essential. Just as every legislator designing a new statute and every judge confronting a new criminal case immediately thinks about a defendant's mens rea, so too should criminal decision makers consider a defendant's motive. No longer should prosecutors, judges, and jurists be afraid of or admonished from considering motives in their numerous decisions.

97. See Husak, supra note 8, at 4 (suggesting that the "most obvious means to differentiate between the conduct" of a husband who kills his incurable wife and a hired assassin who kills for money "is to incorporate reference to motives into their respective offenses").

98. See id. (if the husband and hired assassin described in the footnote above are convicted of the same offense, "[n]o sentencing guidelines can realistically hope to correct the injustice that results . . . .").

Instead, there should be a public about-face in declaring motive relevant to the criminal law.

Instead of allowing only a few select motives to influence criminal liability, there should be consideration of many more motives. Such consideration does not necessarily need to lead to a different substantive outcome, whether in liability or punishment. The influence of motive will not be the same for every case. For some motives, especially those that present difficult proof problems or low moral potency, consideration may have no impact and for a good reason. The goal of this final reform is not necessarily any particular substantive result such as the adoption of a euthanasia or drug addiction defense. Rather, this article seeks to revolutionize the basic attitude surrounding motive. What is important is a universal inclusion of and appreciation for motive in the criminal law. Generations from now, the hope is that a scholar of criminal law will find it perplexing why Jerome Hall would ever have declared motive irrelevant. Instead, the scholar should be studying a criminal law that openly and honestly considers the motives of defendants.

II. THE CHALLENGE OF MOTIVE IN THE SIMPLE STREET SALE

Failure of the current criminal law to appreciate the significance of motives for the moral blameworthiness of defendants has had unfortunate consequences. Among them has been the failure to develop ways to consider motive without undermining other important concerns like effective social control, legality, and institutional competence. In part I, this article hoped to overcome these failures by advocating for the freedom to consider motive at multiple stages of the criminal justice process. Guided by an appreciation of how motives can differ in their provability and in their moral potency, this use of multiple stages can be an effective first step in enhancing the role of motive in the criminal law.

Part II of this article focuses not on proposals or recommendations but rather on an example of how the current criminal law has turned to legal fictions to compensate for its missteps regarding motive. Many scholars recently have located their discussions of motive within larger contexts of modern legal developments such as hate crimes or euthanasia. These developments lend easily to studies of how particularly good or bad motives may warrant special treatment under the law. However, this article looks at a less obvious challenge to motive and that is the simple street sale of illegal drugs. What effect, if any, should the motives of each participant in the sale have on their liability or punishment?

Part II discusses the simple street sale and the agency defense in four sections. The first section focuses on the challenge of criminalizing the simple street sale. The agency defense was formulated to answer this challenge. In the second section, the article describes the historical origins of the agency defense. The third section explains the legal concept of agency, and the final section details the inconsistencies and problems with applying the agency defense to real cases.

A. Understanding the Challenge

The opening narrative is a classic example of a narcotics street transaction. Recall that the buyer was actually an undercover federal drug agent posing as a drug addict. He approached the defendant, a stranger to him, for help in attaining drugs. The defendant agreed, took money from the agent, went into a hotel, bought drugs from a third individual inside the hotel, emerged with the requested drugs, and handed them to the agent.

Who should be punished under the criminal law? For what crimes? What should their relative punishments be? The easiest of the three participants in the street trade is the person inside the hotel. Presumably a profiteer in the distribution chain of narcotic drugs, this individual is financially motivated. He makes a particularly good living

due to the illicit nature of the drug trade. There is little to no hesitation in condemning the profiteer's actions as criminal.[99] More notable and controversial are the political choices to classify the sale of narcotic drugs as very serious felonies and to impose lengthy jail sentences.[100] ("their crimes"—who is this statement made in reference to?)

In contrast, the ultimate buyer[101] presents more difficult questions for motive and moral culpability. Because such individuals are the actual consumers of the illicit drugs, collectively they contribute to the wildly lucrative nature of the drug trade. Without ultimate buyers, there would be no insatiable, pent-up demand and hence no trade. In this way, if the social harm is regarded as the mere existence of the drug trade itself, then the ultimate buyer should certainly be criminally responsible.

The more vexing problem is the motive of the ultimate buyer. As implied by the word *addict*, the motive for the participation of the ultimate buyer may be purely biological.[102] Addicts purchase and use drugs at least in part to avoid the terrible pains of withdrawal. Arguably,

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99. Doing crime to make money has traditionally been regarded as morally culpable. While there may be a real need to make money, effective social control requires the criminal law to encourage lawful livelihoods and to punish unlawful ones. Interestingly, this desire to make money may not always be the determining factor in assessing the morality of a defendant's actions. For some, what may be more relevant is the reason why the defendant wants to make money. For example, if a destitute parent picks the pocket of an unsuspecting victim to get money for food for her hungry children, then her act may be morally excusable to some. For others, what may be morally relevant is whether a defendant has a real choice between an honest living and selling drugs. For others still, neither of these two considerations justify nor excuse the defendant's acts.

100. See infra text accompanying notes 243-59.

101. See supra note 14.

102. See Anahad O'Connor, New Ways to Loosen Addiction's Grip, N.Y. Times, Aug, 3, 2004, at F1 ("Researchers have known for some time that all substances of abuse, including nicotine, alcohol, cocaine, marijuana and heroin, activate the same pleasure pathway in the brain. But they are now finding that many drugs cause subtle changes in brain activity that remain for weeks, months or years. Such alterations, studies have found, help unleash the cravings that can plunge recovered users back into the throes of addiction long after their last puff or snort.").

there is little to no morally culpable choice involved.[103] This is the basis for the addiction defense.[104]

However, on the initial occasions an addict tries drugs, the motive is not biological. Instead, those initial acts may be attributed to more of the usual variety of motives punished under the criminal law.[105] Additionally, some drug addicts do not limit their behavior to participation in simple street sales; instead, they escalate to more serious felonies such as robbery, burglary, and extortion in order to support their drug habits.[106] For both these reasons, numerous jurisdictions choose not to exempt the ultimate buyer completely from criminal liability and therefore reject the addiction defense.

This decision to impose criminal liability on the ultimate buyer leads to the next challenge of defining their offense and the appropriate punishment. One option is to treat all participants in the simple street sale the same as drug dealers. Thus, in the narrative, if the person inside the hotel is charged with sale and sentenced to lengthy jail time, then the buyer would be too. The theory of the prosecution would be that the buyer is an accomplice of the person inside the hotel.[107] Such suggestion may at first seem preposterous but consideration of the elements of accomplice liability lends some plausibility.[108]

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103. See id. ("Although experts acknowledge that drug abuse begins as a voluntary behavior, many argue that at some point a perilous line is crossed. Brain cells that are repeatedly assaulted by addictive drugs change shape. The brain's reward pathway—the same, primitive system that by evolutionary design makes basic drives like sex and eating pleasurable—is highjacked. The urge to get high is insatiable. In experiments, lab animals will press a lever for cocaine until it kills them.").

104. See infra text accompanying notes 262-75.

105. See Paul Robinson, Criminal Defenses § 194(e), at 457 (1984).

106. See Bruce D. Johnson, Taking Care of Business 45-48 (1985).

107. See also infra text accompanying note 111 and note 111.

108. An act of assistance or encouragement is readily satisfied by the buyer's acts of requesting, paying for, and ultimately receiving the drugs. Such acts are not only helpful but also necessary for the seller to be guilty of sale. Furthermore, the intent of the buyer is certainly to help the seller and to complete the sale. Thus, the technical elements of accomplice liability exist. For detailed discussion of the elements of accomplice liability, see infra text accompanying notes 172-76.

What remains open is the normative question of whether it is fair and just to punish the buyer and the seller equally,[109] especially in light of the serious jail time that accompanies sale or distribution offenses. Because of the biological motive that may underlie the conduct of buyers, many legislatures decline this option to treat those individuals as equally culpable as sellers. Still wanting to hold ultimate buyers criminally liable, legislatures turn to a second option that classifies the behavior as the lesser offense of possession of drugs. Usually, the punishment for such an offense pales in comparison to the felony sale of drugs.[110] This option condemns the behavior of the ultimate buyer as criminal but also recognizes that their moral culpability may be significantly lower than that of a drug dealer.

By defining their offense as the unlawful possession of drugs, this option disregards any role the buyer may have had in the sale of the drugs. The buyer of illicit drugs is exempt from an otherwise apt application of accomplice liability. Professor LaFave explains that accomplice doctrine does not apply "where the crime is so defined that participation by another is inevitably incident to its commission. . . . [because] the legislature, by specifying the kind of individual who was guilty when involved in a transaction necessarily involving two or more parties, must have intended to leave the participation by the others unpunished."[111] A conscious separation between the seller inside the hotel and the ultimate buyer in terms of their offenses and penalties marks the sale and possession approach to criminalizing the simple street sale.[112] It is within the context of this approach that the agency defense was born.

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109. See id.

110. See supra note 16.

111. LaFave, supra note 19, § 13.2(e), at 693.

112. For a long time, this was the approach used in most states including New York; over time, through the various reforms of the war on drugs, it has been replaced by the distribution approach. See infra text accompanying notes 143-51.

Once jurisdictions adopt the sale and possession approach to criminalizing the simple street sale, there still remains the most difficult of the three participants: the steerer. Given the condemnation of the other two participants, jurisdictions easily decide to prosecute the steerer too. After all, the conduct of the steerer is indispensable to that final stage of distribution, the simple street sale. Without it, the seller and the ultimate buyer would not be able to conduct their transaction, at least not in the same way. Perhaps some sellers would even be deterred from engaging in the drug business if they had to expose themselves directly to buyers and be more vulnerable to law enforcement.[113] So, again, if the social harm is minimally the illicit drug trade itself, then the steerer should be criminally liable.

However, the task of defining the precise offense of the steerer is still hard. Using the facts of the narrative again, should the steerer defendant be charged with felony sale? How about misdemeanor possession? Or should he face a third offense that is entirely distinct from sale and possession?[114] The first option of charging sale is interesting because the theory of the prosecution could be that the defendant was both a principal and an accomplice. If sale is defined broadly to include any transfer of drugs,[115] the steerer is guilty himself because he handed the drugs himself to the undercover officer.[116] In addition, his acts also qualify as intentional assistance to the person inside the hotel, and thus he can also be prosecuted as an accomplice to the seller. Likewise, the steerer may be charged with possession as an accomplice to the buyer, or if he handles the drugs himself, with possession as a principal.[117]

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113. See infra text accompanying notes 238-39.

114. This article poses these questions in the disjunctive, but it is equally valid and plausible that a steerer faces both sale and possession charges. Any combination with even a third type of offense is possible.

115. See N.Y. Penal Law § 220.00(1) (2005).

116. In the lingo of the drug trade, this act of accepting money from the ultimate buyer and then handing the drugs to him is known as doing a "hand-to-hand." Not all steerers do the hand-to-hand in a transaction.

117. Any theory that relies on accomplice liability requires both an act of

Is the steerer assisting, and therefore an accomplice of, the ultimate buyer or of the seller? Because prosecutions generally use the same charges against the principal and his/her accomplice,[118] the answer to this question becomes intertwined with whether the steerer should face sale or possession charges. Thus, we arrive back where we began, at the same question of offense definition for the steerer.

Should steerers be punished as lightly as buyers or as severely as sellers? What is their relative level of moral

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assistance and a dual mental state consisting of intent to assist and the mental state that is mandated by the statute defining the crime committed by the principal. For most steerers, the act element is easily met. Sending or introducing a customer to a drug dealer or pointing out the location of the drug dealer to inquiring customers would constitute an act of assistance or encouragement. See United States v. Winston, 687 F.2d 832 (6th Cir. 1982); State v. Gladstone, 474 P.2d 274 (Wash. 1970).

The element that poses a greater complication, though, is the dual mental state. In most circumstances, the steerers who walk customers to the locations of drug dealers or make personal introductions do so with the purpose of assisting. In many instances, the steerers do so with the clear intent of making the sales transaction happen. What is less obvious, though, is the identity of the principal the steerer is assisting. Presumed in accomplice doctrine is the fact that the accomplice is assisting a particular principal.

118. On occasion, there are exceptions to this rule of charging both principal and accomplice with the same crime. There is no formal prohibition to convicting an accomplice of a lesser offense or degree of offense than is proven against the principal. See Joshua Dressler, Understanding Criminal Law § 30.06(C), at 484 (3d ed. 2001). Additionally, some courts have recognized the converse of convicting an accomplice of a more serious offense or degree of offense than the principal as acceptable. See State v. Bridges, 604 A.2d 131, 145 (N.J. Super. Ct. App. Div. 1992); see also Oates v. State, 627 A.2d 555, 558-59 (Md. Ct. Spec. App. 1993).

Is it possible then to regard the steerer only as an accomplice to the buyer, but then still charge the principal buyer with possession while charging the accomplice steerer with sale? The short answer is no. The reasoning of permitting different charges against principal and accomplice is that the liability of each participant in a crime should depend on his/her own state of mind and not on that of any other participant. See Bridges, 604 A.2d at 145. Usually in these instances, though, the difference between the charges against accomplice and principal are a matter of degree of mental state, and not a matter of substance. For example, an accomplice may face charges of voluntary manslaughter while the principal may face charges of murder. These offenses at a minimum are based on the same physical act and the same criminal result of the death of another human being. In contrast, while the sale and possession charges in our street trade may involve the same illegal substance, they essentially focus on different physical acts relating to that illegal substance and on distinctive harms to society.

culpability? This depends in part on their motive. Biological addiction and profiteering are once again considerations, as many steerers are drug addicts themselves as well as profiteers in the distribution chain of drugs. The complication is that both motives are present at once. Steerers who are drug addicts need to make money by steering drugs to support their drug habits.[119]

The relative level of their moral culpability can be viewed in two ways. On the one hand, the biological addiction behind the need for money may justify their participation in the drug trade. In other words, their end justifies their means. The act of steering to satisfy a drug habit is less morally culpable than the acts of steering or selling for money generally. Thus, steerers should not be charged with a sale offense or should at least receive a lesser punishment. On the other hand, there are other drug addicts who manage to make money to support their habits through lawful livelihoods. The criminal law should reflect the greater immorality of the steerer's choice to support his drug habit through an unlawful activity. Steerers should not face a mere possession charge alone, as if his crime is the same as any other drug addict. Because steerers choose to work in the illegal drug business, as opposed to some legal activity, their morally culpable profiteering motive overshadows their biological addiction. They should face more serious charges than ultimate buyers.

For most jurisdictions, this second viewpoint prevails. The morally culpable profiteering motive overshadows the

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119. In fact, steerers are often paid in both drugs and money for their services. One study even observed that drug dealers preferred to pay their steerers with both money and drugs and not just money alone. See Johnson, supra note 106, at 71.

Interestingly, this same study discovered that some steerers do not consider themselves dealing drugs. Instead, they regard their payments with drugs as "getting over," whereby addicts get drugs without paying by doing favors for drug dealers. Many heroin users do a variety of favors as ways to "get over." For instance, they will steer, tout, cop, hold drugs, test drugs, lend works, pick up drugs, and run shooting galleries. Despite the breadth and necessity of their services, they do not regard themselves as drug dealers. See id. at 4.

biological addiction, and as a result, steerers face the same serious charges as the sellers. Charged with serious sale felonies and facing lengthy jail sentences, a steerer has a real incentive to be both creative and bold in mounting a successful defense. Some find a legal solution in the agency defense. The next sections describe the history and origins of the agency defense in narcotics sales prosecutions.

B. The History of the Agency Defense

America's drug problem first reached national proportions in the 1960s when many Americans experimented with powerful drugs amidst the liberal politics of the feminist, civil rights, and anti-Vietnam War movements.

> Seemingly overnight, millions of young people started using illegal drugs, many of them children of the middle class.[120]

> However, everything changed when the illicit-drug commerce appeared to spread beyond the Mafia's traditional market: poor minorities. Beginning in the 1960s, the crimes that had long plagued inner cities began to creep into the suburbs. Worse, the children of the suburbs began to express an interest in drugs.[121]

> When Nixon became president, in 1969, the nation was in the grip of a raging heroin epidemic.[122]

Relatively safe and enjoyable experiences with marijuana led many to try other more dangerous drugs like LSD, cocaine, and heroin.[123] Concomitantly, there was a

120. Mathea Falco, The Making of a Drug-Free America 21 (1998).

121. Steven B. Duke & Albert C. Gross, America's Longest War: Rethinking Our Tragic Crusade against Drugs 100 (1993).

122. Massing, supra note 2, at 13.

123. See id. at 22. "During the late 1960s and 1970s, a sizable proportion of the generation born after World War II developed favorable attitudes toward the use of some illicit drugs. In 1979, 68.2 percent of eighteen-to-twenty-five year-olds admitted to government surveyors that they had used marijuana or hashish at least once, and 27.5 percent of that age group admitted having used cocaine."

frightening explosion in crime throughout the country. In the mid-1960s, property crime and violent crime began to rise dramatically and would continue to do so through the early 1990s.[124]

As a result of their historical growth together, drug abuse and crime have long been associated in the minds of Americans.[125] Indeed, politicians and their strategists have seized upon this association, exaggerated and manufactured statistics, and manipulated fears to their advantage.[126]

Not surprisingly, the federal government and many state governments enacted new penal laws, adopted more aggressive policing tactics, created new agencies, and poured significant amounts of money into their drug-fighting efforts.[127] For example, the federal drug enforcement budget grew from $65 million in 1969 to $719 million in 1974.[128] The war on drugs was in earnest, and all of these efforts were focused on eliminating or at least reducing the supply of drugs.[129]

Duke & Gross, supra note 121, at 100 (quoting National Institute on Drug Abuse, National Household Survey on Drug Abuse: Main Findings 1985 (1989)).

124. See Duke & Gross, supra note 121, at 104 ("Property-crime rates have tripled since the mid-1960s, and violent crime rates have more than doubled .... About 1985 ... near the crest of the cocaine epidemic, the rates resumed their climb.").

125. See James C. McKinley, Jr., Signs of a Drug War Thaw; As Fear Eases, Rockefeller Laws Seem Less Necessary, N.Y. Times, Jan. 21, 2001, at A29. "According to a June 1971 Gallup poll, Americans considered drugs the nation's third-most serious problem, behind Vietnam and the economy." Massing, supra note 2, at 113 (quoting the June 1971 Gallup poll).

126. "[D]uring the heroin panic of Nixon's War on Drugs, junkies would be blamed for stealing as much as fifteen times the value of *everything* stolen in the United States." Baum, supra note 3, at 69-70 (describing numerous examples of statements made by think tanks, government officials, and elected politicians blaming heroin addicts for exaggerated dollar amounts of crime). For example, in 1972, "[t]he conservative Hudson Institute estimated that New York City's 250,000 heroin addicts were responsible for a whopping $1.7 billion in crime, which was well more than the total mount of crime in the *nation*." Id.

127. See generally Baum, supra note 3, passim.

128. See Baum, supra note 3, at 75.

129. Consider the following as an example of the supply side attitude, even in the mid-1990s. "The focus of our effort was going to be on the source of the problem: the drug dealer. We weren't going after the users. We would systematically take out the low-level street dealer, the mid-level operator and

Against this backdrop, in 1978, the New York State Court of Appeals handed down a significant quartet of cases that focused on the agency defense being raised in narcotics sales prosecutions.[130] The agency defense had become confused in its use and required judicial detailing of its exact parameters. The high court stepped up to the challenge and tried to provide guidance to its lower courts. In providing its guidelines, the court shed some light on how the agency defense came to be in narcotics sale prosecutions.

The first notable appellate opinion to address directly the question of agency in the criminal sale of narcotics was in 1954 in *United States v. Sawyer*.[131] This case supplied the facts for the opening narrative of the article. At trial, the District Court refused the defendant's request for the jury to be instructed on the legal difference between acting as a seller and acting as a procuring agent for the buyer.[132] On review, the Third Circuit agreed with the defendant's request and, in reversing, stated that the trial court

> should at least have pointed out to the jury that if they believed that the federal agent asked the defendant to get some heroin for him and thereupon the defendant undertook to act in the prospective purchaser's behalf rather than his own, and in so doing purchased the drug from a third person with whom he was not associated in selling, and thereafter delivered it to the buyer, the defendant would not be a seller and could not be convicted under this indictment.[133]

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high-level king pin." Massing, supra note 2, at 255 (quoting a description of Operation Juggernaut in 1995 by former Commissioner of the New York City Police Department, William Bratton, in his book Turnaround). See also Falco, supra note 120, at 3-11.

130. See People v. Roche, 379 N.E.2d 208 (N.Y. 1978); People v. Sierra, 379 N.E.2d 196 (N.Y. 1978); People v. Lam Lek Chong, 379 N.E.2d 200 (N.Y. 1978); People v. Argibay, 379 N.E.2d 191 (N.Y. 1978).

131. 210 F.2d 169 (3d Cir. 1954).

132. See id.

133. Id. at 170. Interestingly, the defendant also appealed on the ground that the District Court erred by not instructing the jury on the defense of entrapment. The Court of Appeals also agreed with defendant on this point. Sawyer, 210 F.2d at 170-71.

In *Sawyer*, some evidence suggests that the defendant acted on the undercover federal agent's behalf and not on his own behalf. At the time of the incident the defendant was walking home from his job when he initially rejected the agent's request for heroin, explaining that he did not do that sort of thing. Undeterred, the agent approached the defendant again, and this time, feigned a dramatic and violent seizure from apparent withdrawal. He begged the defendant to get him some heroin to relieve his distress. Only then did the defendant take twenty dollars from the agent, go inside a nearby hotel, buy heroin, and bring the heroin back to the agent.[134]

While the Third Circuit may be correct in its assessment of the evidence and the defendant's selfless motive, what is less clear is the legal significance of such motive. The Third Circuit stated that the distinction between acting on the ultimate purchaser's behalf and acting on the defendant's own behalf is "obvious" to trained lawyers as the telltale difference between a seller and a procuring agent. In contrast, the court worried that both these distinctions are lost to lay jurors who thus need a formal instruction from a trial judge.[135] On this ground, the court reversed the conviction for the sale of narcotics and remanded for a new trial.[136] Other than its conclusion about the relative knowledge of lawyers and lay jurors and the need for a jury instruction, the Third Circuit did not elaborate on the legal significance of these distinctions. Instead, it glossed over exactly why or how a selfless motive of the defendant deserved an acquittal of sale charges.

Moreover, the Third Circuit cited no precedent to support its critical introduction of the agency defense in a case of narcotic sales. Perhaps the applicability and analysis of the agency defense is so obvious to the Third Circuit that it figured precedent is unnecessary. Hence,

134. See id. at 170.
135. Id.
136. See id. at 171.

the agency defense was introduced to drug sales without detailed explanation and without precedent.

The first New York case to recognize the agency defense was *People v. Buster* in 1955.[137] The intermediate appellate court issued a very brief memorandum opinion which stated that "[t]he People's evidence established affirmatively that defendant acted in the transaction solely as the agent of the prospective purchaser."[138] Because "[t]here is nothing to show that the accused received any benefit for bringing trade to the seller, or that the two were associated in distributing narcotics," [139] the appellate court cited to *Sawyer* and ruled that the trial court should not have allowed the jury to consider the charge of attempted sale of narcotics against the accused.[140] There were no other facts or legal explanations offered in the opinion. Once again, as with the federal experience, the agency defense was introduced to New York without any helpful reasoning.

Like New York, other federal circuits[141] and states[142] also initially adopted the agency defense in their respective

137. People v. Buster, 145 N.Y.S.2d 437 (N.Y. App. Div. 4th Dep't 1955). There was an earlier New York narcotics case, *People v. Pasquarello*, in which the same Fourth Department court indirectly relied upon the agency concept to dismiss the defendant's appeal. 123 N.Y.S.2d 98 (N.Y. App. Div. 4th Dep't 1953). There the defendant protested lack of instruction to the jury on accomplice theory by the trial court because he wanted the jury to consider the defense that he was an accomplice to the buyer in the drug transaction. Id. at 406. The appellate court disagreed, reasoning that since the buyer could not have been charged with sale of narcotics and yet this defendant was, then the buyer and defendant could not possibly have been accomplices. The court's reasoning is quite illogical and assumes that the sale charge facing the defendant was legally correct without addressing the defendant's point. Pasquarello's accomplice defense was actually the agency defense in disguise. He wanted to be considered the buyer's agent such that his liability would be limited to the liability of the buyer and therefore would not include the sale charge. Because this opinion failed to discuss the agency defense directly, it does not merit the designation of being the first New York agency case; however, it was cited by the *Buster* court and hence is worth explaining.

138. Buster, 145 N.Y.S.2d at 438.

139. Id.

140. See id. The opinion also cites to the *Pasquarello* opinion as precedent. See supra note 137.

141. The First Circuit adopted the agency defense for the first time in 1970 in

narcotics cases. However, in 1970 Congress single-handedly undermined the expansion of the agency defense by passing the landmark Controlled Substances Act.[143] In reaction to the growing crisis in drug abuse throughout the country, Congress dramatically changed its approach to the criminalization of drugs.[144] Looking for a more effective strategy against the booming illegal drug business, Congress greatly expanded the scope of drug laws by declaring it unlawful "for any person knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance."[145] In direct response to the agency defense, the term "distribute" was defined as "deliver[ing] . . . a controlled substance or a listed chemical,"[146] and the term "deliver" was further defined as "the actual, constructive, or attempted transfer of a controlled substance or a listed chemical, *whether or not there exists an agency relationship*."[147] Explicit within this

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the case of *United States v. Barcella* and observed that the majority of its sister circuits had already done so. United States v. Barcella, 432 F.2d 570, 571 (1st Cir. 1970) (citing United States v. Winfield, 341 F.2d 70 (2d Cir. 1965) (dictum), Myers v. United States, 337 F.2d 22 (8th Cir. 1964) (dictum), United States v. Sizer, 292 F.2d 596 (4th Cir. 1961) (dictum), Vasquez v. United States, 290 F.2d 897 (9th Cir. 1961) (dictum), Kelley v. United States, 275 F.2d 10 (D.C. Cir. 1960), Adams v. United States, 220 F.2d 297 (5th Cir. 1955)).

142. See William Donnino & Anthony Girese, The Agency Defense in Drug Cases, N.Y.L.J., Apr. 27, 1978, at 1 (such states included Texas, Kansas, Pennsylvania, Nevada, Alabama, Massachusetts, Michigan, and Oklahoma). See also People v. Roche, 379 N.E.2d 208, 211 n.1 (N.Y. 1978) (citing to the clear majority of sister States that had also adopted the agency defense by 1978 such as Colorado, Florida, Iowa, Utah, Washington, Alaska, Arizona, New Hampshire, New Jersey, and Wyoming, among others).

143. The sale and possession approach was repealed by the Act of October 27, 1970, Pub. L. No. 91-513, § 1101, and was replaced by the Comprehensive Drug Abuse and Control Act of 1970. Title II of that statue is more popularly known as the Controlled Substances Act. See Pub. L. 91-513, tit. II, 84 Stat. 1242 (Oct. 27, 1970).

144. See Scott W. Parker, Note, An Argument for Preserving the Agency Defense As Applied to Prosecutions for Unlawful Sale, Delivery, and Possession of Drugs, 66 Fordham L. Rev. 2649, 2662 (1998).

145. 21 U.S.C. § 841(a)(1) (2003).

146. 21 U.S.C. § 802(11) (2003).

147. 21 U.S.C. § 802(8) (2003) (emphasis added).

new crime of distribution is an exclusion of the agency defense.

Armed with this new powerful statute, prosecutors began to charge defendants with distribution as opposed to sale of controlled substances. As a result of the explicit reference to the agency defense, federal courts uniformly declared the defense inapplicable to distribution charges and ended its short-lived presence in the federal narcotics cases.[148]

The passage of this remarkable new law by Congress influenced many state legislatures to follow suit. Forty-eight out of fifty states adopted the Uniform Controlled Substances Act[149] in one form or another. Not all of them included the expansive criminalization and definition of "deliver," but some did.[150] Regardless of its exact form, these new broad drug laws in the states led to the inevitable demise of the agency defense in most state courts as well.[151]

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148. See, e.g. United States v. Pruitt, 487 F.2d 1241, 1243 (8th Cir. 1973) (holding that the new definitions of distribute and deliver eliminate the agency defense); United States v. Miller, 483 F.2d 61, 62 (5th Cir. 1973); United States v. Hernandez, 480 F.2d 1044, 1046 (9th Cir. 1973); United States v. Pierce, 354 F. Supp. 616, 619 (D.C. Cir. 1973) (per curiam); United States v. Porter, 764 F.2d 1, 11-12 (1st Cir. 1985); United States v. Redwood, 492 F.2d 216, 216 (3d Cir. 1974); United States v. Masullo, 489 F.2d 217, 220-21 (2d Cir. 1973).

149. The Uniform Controlled Substances Act of 1970 was modeled after the federal Controlled Substances Act. See Unif. Controlled Substances Act (amended 1994), 9 U.L.A. 645-50 pt. IV (1997).

150. See, e.g. Alaska Stat. § 11.71.900(6) (2003) (defining deliver as "the actual, constructive, or attempted transfer from one person to another of a controlled substance whether or not there is an agency relationship"); Conn. Gen. Stat. Ann. § 21a-240(11) (2003) (defining deliver as "the actual, constructive or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship"); Neb. Rev. Stat. § 28-401 (12) (2003) (indicating that "[d]eliver or delivery shall mean the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship"); 720 Ill. Comp. Stat. Ann. 600/2(C) (2003) (stating that "'[d]eliver' or 'delivery' means the actual, constructive or attempted transfer of possession, with or without consideration, whether or not there is an agency relationship."); La. Rev. Stat. Ann. § 40:961(10) (2003) (defining deliver as "the transfer of a controlled dangerous substance whether or not there exists an agency relationship."); see also Parker, supra note 144, at 2664 n.93.

151. See Parker, supra note 144, at 2664-72, 2664 n.95 (describing the expansion of state drug laws and the corresponding abandonment of the agency

In contrast to its sister states, New York did not follow the federal distribution approach. Instead of adopting this new offense of distribution of narcotics, New York continued to use its traditionally broad definition of sale to capture any distributive acts.[152] Even more notable is that New York did not follow the federal lead in explicitly excluding the agency defense through a statutory definition. Rather, the New York legislature allowed this judicially created defense to continue.[153] This legislative inaction was noted in 1978 when the Court of Appeals of New York addressed the agency defense in a bold attempt to provide guidance and clarity to its trial courts.[154]

C. The Concept of Agency

In order to grasp why the agency defense arose in narcotics prosecutions, it is necessary to understand the legal concept of agency and its similarities to and differences from accomplice liability. Agency is not a concept that originates with narcotics prosecutions or even criminal law. As explained by a state court in Maine, the agency concept is borrowed from commercial law.[155]

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defense while also discussing in detail the few states, such as Iowa and Alaska, who still made room for the agency defense within the new drug laws). Since 1997, Iowa and Alaska too have given up on the agency defense. See State v. Allen, 633 N.W.2d 752, 753 (Iowa 2001); State v. Burden, 948 P.2d 991, 994 (Alaska 1997).

152. See Allen, 633 N.W.2d at 756 ("Only New York's highest court appears to recognize the continued viability of the procuring agent defense. The court of appeals' view is premised, however, on a drug statute which retains the distinction between buyers and sellers. . . .")

153. "[J]ust as it has chosen to leave the act of buying drugs unprohibited by the criminal law, the Legislature has also left the agency defense inviolate. Given the accelerated and massive attention that the narcotics law have received within the last decade, and the fact that our Legislature has chosen to punish drug trafficking more severely than has any other jurisdiction, we must assume that its acceptance of the defense represents a calculated and ameliorative judgment not to impose such penalties upon a person who merely facilitates the acquisition of drugs by a purchaser." Roche, 379 N.E.2d at 212.

154. See id.

155. State v. Mansir, 440 A.2d 6 (Me. 1981) (rejecting agency defense in narcotics case because such defense would circumscribe the legislative intent of drug laws "by the usage of concepts from the law of commerce").

Expanding beyond its commercial law roots, the agency concept now appears in a wide variety of areas of law including torts[156] and corporations.[157] There are two important aspects to the concept of agency: the formation of a principal-agent relationship and its implications.

How exactly is an agency relationship formed? According to the Restatement (Second) of Agency, "[a]gency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."[158] This relationship will only exist "if there has been a manifestation by the principal to the agent that the agent may act on his account, and consent by the agent so to act."[159] An actual belief of an alleged agent that he is an agent of the principal is not sufficient. Such belief must be reasonable and must be based upon some conduct of the principal that indicates that the agent is so authorized to act in order to create a legally cognizable agency relationship.[160] It is the conduct of both parties that is important to the formation of

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Courts have also explained that since agency is originally a commercial law concept, the principles governing its use in that original context may not strictly apply to the criminal context. See, e.g. People v. Roche, 379 N.E.2d 208, 211 (1978) ("Concededly, the introduction of the term 'agency' into the lexicon of the law governing drug prosecutions at most carries with it limited application of concepts which govern its use in defining relationships and responsibilities more characteristic of the world of commerce and property.... Blunt acknowledgement of that fact would lessen consequent confusion."); People v. Argibay, 379 N.E.2d 191, 194 (N.Y. 1978) ("[I]t would be ludicrous to apply commercial law definitions to the criminal law . . . ."). Arguably, though, the ill fit between commercial law concept and criminal law context should lead not to a relaxed application of principles, but rather to a rejection of its adaptation at all.

156. In torts, the doctrine of respondeat superior imposes vicarious liability on a master/employer for tortious acts committed by her servant/employee if the tortious acts occur within the scope of the employment relationship.

157. General rules of agency determine the power and obligations of corporate officers in their dealings with outsiders. See Robbins v. Panitz, 463 N.E.2d 615 (1984) (held that because of the status as agent of corporation, corporate officer is not personally liable for ending an employment contract unless such act constitutes a separate tortious act).

158. Restatement (Second) of Agency § 1 (1958).

159. Id. § 15.

160. Id. § 15, cmt. a.

an agency relationship. The Restatement explains that "[t]he principal must in some manner indicate that the agent is to act for him, and the agent must act or agree to act on the principal's behalf and subject to his control."[161]

Interestingly, such a relationship can result whether or not there is a contract between the principal and agent. This is so because consideration is not necessary to form an agency relationship.[162] The agent does not need to promise to act on behalf of the principal and the principal does not need to provide any compensation for the services of the agent.[163] Instead, agency can simply "result from a direction by a person to another to act on his account . . . ."[164] Of course, if there are such promises and compensation and a contract results, agency can still be born from a contractual arrangement.[165] Under such circumstances, the law of contracts and agency would be applicable.

The critical legal consequence of an agency relationship is the power conferred upon an agent. An agent has the power to alter the legal relationship between his principal and other third persons.[166] For example, an agent can contract to acquire property from a third person in exchange for money. As a result of the agent's actions, the principal would have a contractual obligation with that third person. This type of agent is known as a buyer's agent, a purchasing agent, or a procuring agent. He has this power because he agreed with his principal that he would act primarily for the benefit of the principal and not for himself.[167]

The primacy of the principal's benefit is at the core of the fiduciary nature of the agency relationship.[168]

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161. Id. § 1, cmt. 1a.
162. Id. § 16.
163. Id. § 16, cmt. a.
164. Id.
165. Id.
166. Id. § 12.
167. Id. § 14K (explaining the difference between a buyer's agent and a supplier).
168. Fiduciary relationships are a special breed of relationships in the law.

> [A]n agent employed to buy or to sell is subject to a duty to the principal, within the limits set by the principal's directions, to be loyal to the principal's interests and to use reasonable care to obtain terms which best satisfy the manifested purposes of the principal.[169]

Once the principal's benefit is subordinated to the self-interest of an agent, then that alleged agent is not an agent at all; instead, he is a supplier[170] or a non-agent contractor.[171] It is acceptable for an agent to have other interests, including self-interests, but they must be secondary to the principal's interest.

This classic concept of agency is remarkably similar to the doctrine of accomplice liability in criminal law. Like agency, accomplice liability is also concerned with two particular parties: a principal and an accomplice. Like agency, the end result of accomplice liability is the imposition of liability on one person for the acts of another. They both address the question of when the acts and words of one person should create obligations and liability for another person under the law. There is a slight difference though. Agency, especially in non-criminal contexts such as commercial law, typically leads to the imposition of financial and other civil obligations upon the *principal*. Accomplice liability results in moral condemnation and criminal liability being imposed by an entire community on an *accomplice*.[172]

Derived from Roman law, the term fiduciary refers to "[a] person who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, trust, confidence, and candor." Black's Law Dictionary 658 (8th ed. 2004). Examples of fiduciaries, other than agents, include trustees and estate administrators. See id.

169. Restatement (Second) of Agency § 424 (1958).

170. Id. § 14K (explaining the difference between a buyer's agent and a supplier).

171. Id. § 14N, cmt. b ("A person who contracts to accomplish something for another or to deliver something to another, but who is not acting as a fiduciary for the other, is a non-agent contractor.").

172. Understandably then, traditional commercial agency analysis focuses on objective evidence establishing whether a principal has so authorized and empowered an agent to act on his behalf. Common manifestations of such authority and empowerment are found in express agreements or in the status of

Even more important than this slight difference in which party bears liability is the difference in the prerequisites for legal status as an accomplice versus an agent. Section 2.06 of the Model Penal Code defines an accomplice as a person who is accountable for the crime committed by another because he/she (a) gave assistance or encouragement or failed to perform a legal duty to prevent the crime (b) with the intent thereby to promote or facilitate commission of the crime.[173]

This intent element actually requires two distinct mental states. First, "the accomplice must intend that his acts have the effect of assisting or encouraging another."[174] Second, "the accomplice must also have the mental state required for the crime of which he is to be convicted on an accomplice theory."[175] The accomplice's purpose must be to encourage or assist another in the commission of a crime as to which the accomplice also has the requisite mental state.[176] Unlike agency, there is no requirement that the principal's interest be dominant.

The absence of this requirement reflects a subtle but critical difference in the motives of accomplices and agents. It is entirely acceptable for an accomplice's self-interest to outweigh his intent to aid the principal, so long as he still has such intent to aid and whatever other mens rea is

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an agent as an officer of a corporation.

On the other hand, accomplice doctrine concerns itself primarily with the subjective mental state of an alleged accomplice with respect to the crime at hand and does not require an express association with the principal. Of course, it is still required that accomplices do an act of assistance. What is not required is that there be some prior understanding or arrangement, express or otherwise, with the principal criminal actor. Such prior understandings or arrangements are required for other types of multi-party offenses such as conspiracy or solicitation, but they are not a necessary element of accomplice liability.

173. Model Penal Code § 2.06 (Proposed Official Draft 1962); LaFave, supra note 19, §13.2, at 671 (4th ed. 2003). This modern formulation in the Model Penal Code fairly represents the modern substantive rule of accomplice liability as inherited from the common law. The common law's archaic and formalistic classification of accomplices based upon the timing of their assistance relative to the principal's criminal act has long been set aside. See id. at 670-71.

174. LaFave, supra note 19, § 13.2(c), at 676.

175. Id. § 13.2(c), at 676-77.

176. Id. §13.2(c), at 675.

required by the offense itself. In other words, an accomplice's own self-interest can be his motive or action-initiator. For an agent, though, his motive must not be self-interest. As a fiduciary, his action-initiator must be the interests of his principal, above all else.

It is this critical difference between agency and accomplice liability that accounts for the adoption of a commercial law concept as a defense in a criminal narcotics prosecution. After all, since accomplice liability also establishes a particular relationship between two parties, why did defense attorneys and judges feel the need to borrow the agency concept from commercial law? Instead of claiming status as the agent of the buyer, why didn't they simply portray the steerer as an accomplice of the buyer? The accomplice defense proves to be vulnerable and ineffective. First, being an accomplice to the buyer does not preclude being an accomplice to the seller. A steerer could intend to aid both the buyer and the seller in a simple street sale when he makes an introduction or does a hand-to-hand transaction. Second, being an accomplice to the buyer does not preclude being a principal for the offense of sale. Thus, an accomplice defense does not foreclose liability for the sale charges. Hence, the steerer defendant turns to the agency defense.

Can a steerer claim to be a purchasing agent for the ultimate buyer? An agency relationship that is formed to have the agent carry out an illegal act on the principal's behalf is in itself illegal. The Restatement (Second) of Agency unequivocally states that "[t]he appointment of an agent to do an act is illegal if an agreement to do such act or the doing of the act itself would be criminal, tortious, or otherwise opposed to public policy."[177] Declaring agency appointments illegal may discourage their formation; however, by no means does such a declaration ensure that these illegal appointments will not be made. It is unlikely that a principal and an agent who are already contemplating a crime will be deterred by a rule declaring

177. Restatement (Second) of Agency § 19 (1958).

their relationship a crime too. Wisely recognizing this, the Restatement provides that while illegal, the agency relationship is not considered ineffective. Through the appointment of an agent to do a criminal act, the principal is still liable as if she herself had done the criminal act directly.[178] Of course, the agent is criminally liable as well since he is the one who actually commits the criminal act.[179]

Although he may be liable for some offense, what the steerer wants is protection specifically from the sale charges. The Court of Appeals of New York in 1978 issued a quartet of decisions that explains how the agency defense offers that protection.[180] There are two distinct explanations. First, since an agent is representing the principal throughout the entire transaction, when the steerer hands the drugs over to the ultimate buyer, the steerer is merely giving to the ultimate buyer what the ultimate buyer already owns. The physical exchange between the steerer and the ultimate buyer does not constitute an actual transfer since the steerer and the ultimate buyer are agent and principal and constitute one legal entity.

> The underlying theorization is that a person, who acts solely on behalf of the recipient of the drugs in a transaction, performs as an extension of the recipient and cannot be guilty of a sale, since that person is merely transferring to

178. Id. § 19, cmt. c (recognizing that vicarious liability imposed upon a principal based upon an agency relationship would still be subject to the rules on accomplice liability).

179. It is no defense that the agent committed this criminal act on the order of a principal. "[I]t is well settled that the command of a master to a servant, a principal to an agent, or a parent to his child, will not justify a criminal act done in pursuance therefore." Donnino & Girese, supra note 142, at 1 (citing 16 C.J. Criminal Law § 56, at 87-88, and 22 C.J.S. Criminal Law § 39, at 129-30). "The law does not recognize the doctrine of agency as a defense to a criminal charge. It deals with the person who commits the overt act, and while others may be guilty as accessories, the party committing the prohibited act is not permitted to interpose the defense that he acted only as an agent or employee." Id. at 24 (quoting State v. Chauvin, 132 S.W. 243 (Mo. 1910)).

180. Explanations are not found in most of opinions applying the agency defense. Like the court in Sawyer, perhaps courts assume that the reasons why an agent cannot be liable of sales are obvious and do not require any detailing.

> the recipient that which the recipient already owns or that to which he is entitled, there being no sale, exchange, gift or disposal of the drugs to the recipient.[181]

Even the broad definition of sale in New York does not include these exchanges between agent and principal.

> Under New York law a person may be found guilty of selling drugs when he gives them to another even though he has received nothing in return.... Reading the statute literally, any passing of drugs from one person to another would constitute a sale.... However there are certain cases where the defendant's mere delivery of the drugs does not appear to involve the same degree of culpability, or warrant the extreme penalties, associated with pushing drugs. For instance, when a friend of the defendant gives him money and asks him to purchase a small quantity of drugs the defendant's delivery of the drugs to the buyer could be considered a sale under a literal interpretation of the statute although, as a practical matter, he was simply a buyer who purchased the drugs on behalf of another.[182]

The second explanation is that as a procuring agent for the ultimate buyer, the steerer cannot be guilty of any offense more serious than his principal. If the principal is only guilty of misdemeanor drug possession, then the agent can only be guilty of this same offense. Unlike the first explanation, which assumes that the agent and principal are one and the same legal entity, this second explanation recognizes that the agent and principal are two separate entities, but by virtue of their relationship, concludes that these two entities should face the same criminal charge.

> [T]he underlying theory of the agency defense in drug cases is that one who acts as procuring agent for the buyer alone is a principal [as opposed to accomplice, *not* as opposed to agent] or conspirator in the purchase rather than the sale of

181. People v. Sierra, 379 N.E.2d 196, 198-99 (N.Y. 1978) (holding that agency is not a defense to charge of criminal possession of narcotics since possession, unlike sale, does not depend upon notions of ownership or title).

182. Lam Lek Chong, 379 N.E.2d at 205.

> the contraband.... [A]n individual who participates in such a transaction solely to assist a buyer and only on his behalf, incurs no greater criminal liability than does the purchaser he aids and from whom his entire standing in the transaction is derived.[183]

Although there are appreciable theoretical differences, both explanations provide an agency defense for only certain steerers. Not every steerer qualifies for the status of an agent of the buyer.[184] Simply steering a buyer to the seller is not enough to be considered an agent.[185] He must also be a mere extension of the buyer. Most importantly, he must be motivated by a desire to advance the interests of the ultimate buyer, rather than an independent desire to promote the drug transaction.[186] For example, the steerer must not be motivated by any expectations of profit for himself.[187] The requisite dominance of the principal's interest originates from the fiduciary nature of the principal-agent relationship, as developed in traditional commercial law.[188]

The implication of this motive requirement is that an agent of the ultimate buyer cannot also be an agent of the seller. As the New York Court of Appeals explained in *People v. Roche*, if a defendant "is in fact interested in the outcome, . . . by an agency relationship with the seller, he

183. People v. Roche, 379 N.E.2d 208, 211 (1978).

184. See People v. Argibay, 379 N.E.2d 191, 194 (N.Y. 1978) ("There mere fact that Argibay was a middleman or a broker, however, is not enough to warrant a charge on agency. . . . All agents are, concededly, middlemen of sorts. But the converse is not true.")

185. See id. (giving an example of a middleman who aims to satisfy both a seller and a buyer, but does so largely for his own benefit as one who is not an agent).

186. See id. at 191, 194-95.

187. See, e.g. People v. Roche, 379 N.E.2d 209, 212-13 (N.Y. 1978) (when assessing whether a steerer has the appropriate motivations becoming of an agent, courts are typically asking whether the steerer is motivated by his own self-interested profit).

188. See Argibay, 379 N.E.2d at 194-95 (citing to the duty of loyalty owed to a principal by an agent in commercial law as having some limited relevance for the criminal law).

fails, by definition, to be an agent for the purchaser."[189] By definition, an agent has only one motivation and that is the motivation to act on behalf of his principal, the buyer. It is not possible to have two dominant interests or two principals. Unlike an accomplice defense, which leaves open the possibility of also being an accomplice to the seller as well as the buyer, the agency defense forecloses any relationship with the seller.[190] Thus, it provides the escape from liability for the serious offense of sale.

While both accomplice liability and agency lead to the imposition of liability on a person for the acts of another, agency provides a superior defense for a steerer charged with criminal sale offenses. By narrowly defining the primary motive of an agent of the buyer, the New York Court of Appeals prevents a prosecutor from pursuing sale charges because such a steerer cannot then also be a principal seller or an accomplice to the seller.[191]

In following the supply side strategy of the war on drugs, jurisdictions answer the conceptual challenge of criminalizing the simple street sale by declaring the acts of sellers serious felonies and the acts of buyers petty misdemeanors. Rejecting the option of creating a third type of offense, jurisdictions choose to prosecute the acts of steerers as the same felonies facing the sellers. In response, steerers turn to a commercial law concept and claim to be the purchasing agent of the ultimate buyers.

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189. Roche, 379 N.E.2d at 212.

190. One court in dicta suggested the possibility of multiple roles for a steerer, meaning that a steerer can be both an agent of the buyer and an accomplice of the seller at the same time. See, e.g. State v. Mansir, 440 A.2d 6, 7 (Me. 1982) (rejecting the adoption of commercial agency as a defense to its drugs laws on other grounds, while at the same time observing that a procuring agent defense would be incomplete and misleading because "[w]hether the defendant acted as an agent of the purchaser is irrelevant, if at the same time the defendant in fact aided the seller with the intent of facilitating the sale").

191. Some states disagree with this position. They have prosecuted and convicted steerers on the theory that they were simultaneously an agent of the buyer and an accomplice of the seller. See, e.g. State v. Burden, 948 P.2d 991, 994 (Alaska 1997); People v. Edwards, 702 P.2d 555, 559 n.5 (Ca. 1985) ("[O]ne who acts as a go-between or agent of either the buyer or seller clearly may be found guilty . . . as an aider and abettor to the seller.").

While leaving open the possibility of liability for drug possession, this agency defense provides the critical protection against serious sale charge and its lengthy prison term. A steerer who is an agent is motivated to do his crime because he wants to advance the interests of his principal. How does a factfinder[192] assess whether a steerer has such a motive? Is such a motive provable in a court of law?

D. Proving (or Trying to Prove) the Agency Defense

Struggling to identify a defendant's motive is not unique to the agency defense. Indeed, our system of criminal law revolves around issues of mens rea such that factfinders are constantly exploring questions regarding mental states of the defendants.[193] To provide some direction, in 1978, the New York Court of Appeals issued guidelines to factfinders on assessing the motives of steerers and the validity of their agency defenses.

In the lengthy opinion of *People v. Lam Lek Chong*, the court featured a laundry list of factors to consider.[194] This list included the following: (1) the nature and extent of the relationship between the steerer and the buyer; (2) whether the buyer or the steerer suggested the purchase; (3) whether the steerer has had other drug dealings with this buyer or other buyers and this seller or other sellers; and (4) whether the steerer profited or stood to profit from the transaction.[195] In the sister opinion of *People v. Roche*, the court added that a factfinder should consider whether the steerer engaged in "[s]alesman-like behavior, commonly connoting an interest that goes beyond representation of the buyer alone . . . ."[196] For instance, did the steerer praise

192. See Lam Lek Chong, 379 N.E.2d at 206 ("The determination as to whether the defendant was a seller, or merely a purchaser doing a favor for a friend, is generally a factual question for the jury to resolve on the circumstances of the particular case.").

193. See supra text accompanying note 23.

194. Lam Lek Chong, 379 N.E.2d at 207.

195. Id.

196. People v. Roche, 379 N.E.2d 208, 212 (N.Y. 1978).

or apologize for the quality of the product or the manner of delivery? Did he bargain over the price?[197] Furthermore, the court stated that prior acquaintance with the seller or familiarity with narcotics in general weigh against a claim of agency.[198]

While enunciating these factors, the court was also careful to emphasize that the determination as to whether a steerer is an agent of the buyer is not a strict "legal formula";[199] rather, it is a determination driven by "common sense and experience."[200] In fact, none of the above-described factors are determinative of a claim of agency. For example, profits or benefits received by a steerer are not absolutely preclusive of agency status. It depends on the nature of these benefits:

> Similarly the fact that the defendant anticipated or received a profit from the sale may be sufficient to establish his intent to sell at the time of the transfer. But it is not unlikely that the buyer, who has obtained drugs with the aid of the defendant, will offer the defendant a share, a tip or reimbursement for expenses as a token of friendship or appreciation for the favor.... Of course receipt of any benefit, particularly a substantial reward promised in advance may be sufficient, as a matter of fact, to show that the defendant did not act solely to accommodate the buyer. But receipt of some incidental benefit, does not necessarily or even ordinarily alter the relationship between the parties, the nature of the transaction or the defendant's culpability.[201]

Since 1978, numerous cases in New York involving sale charges against a steerer defendant have involved the agency defense. Some of them have further developed and

197. Id.
198. Id.
199. Lam Lek Chong, 370 N.E.2d at 207.
200. Id. ("But basically the jury must rely on its own common sense and experience to determine whether, under the circumstances, the defendant was in fact accommodating a friend or was simply a streetwise peddler attempting to avoid the penalties for sale.").
201. Id.

added to the original guidelines of 1978.[202] Indeed, one observer noted in 1997 that "no fewer than 11 factors have been outlined by New York courts to determine whether a defendant is entitled to the defense of agency."[203]

In addition to substantive factors, the high court also provided procedural guidance and cast the agency defense not as an affirmative defense for the defendant to prove, but rather as a failure of proof defense for the State to disprove beyond a reasonable doubt.[204] In other words, agency negates "the existence of an essential element of the crime—the 'sale.'"[205] Therefore, if there is any reasonable view of the evidence that the defendant was an agent of the ultimate buyer, then the defense should be submitted to the jury with instructions from the court.[206]

Some cases clearly illustrate these common sense principles of how to evaluate whether a defendant possessed the necessary motive to qualify as an agent of the buyer and avoid liability for sale. The simplest are those in which the defendants actually confess their true self-interested motives and defeat their own agency defenses.[207] Even without an admission, other cases feature enough evidence to defeat an agency defense easily. For example, in *People v. Norman*, the defendant encouraged the female undercover officer to contact him on his pager, referenced various places where she could make a purchase, imposed certain tests on the officer to secure

202. See, e.g. People v. Monahan, 493 N.Y.S.2d 898 (N.Y. App. Div. 2d Dep't 1995) (holding that the prosecution may present defendant's prior drug convictions as proof of prior familiarity with the drug trade if a defendant plans to use the agency defense); People v. Polesenberg, 540 N.Y.S.2d 87 (N.Y. App. Div. 4th Dep't 1989) (denying agency charge where drug sale took place in defendant's home).

203. Abraham Abramovsky, The Agency Defense in New York Drug Prosecutions, N.Y.L.J., Apr. 1, 1997, at 3.

204. See Roche, 379 N.E.2d at 213. But see People v. Satloff, 437 N.E.2d 271 (N.Y. 1982); People v. White, 539 N.Y.S.2d 1001 (N.Y. App. Div. 2d Dep't 1989).

205. Roche, 379 N.E.2d at 213 (quoting Lewis v. United States, 337 F.2d 541, 543 (D.C. Cir. 1964).

206. See Roche, 379 N.E.2d at 213.

207. See, e.g. People v. Newland, 751 N.Y.S.2d 848 (N.Y. App. Div. 1st Dep't 2002) (describing how defendant admitted that his sole motive for arranging the transaction was to obtain a benefit for himself).

her identity, used his own money to make the purchase, and promised the officer that she could obtain more packets from him another time.[208] All of this was strong evidence of salesman-like behavior and thus the appellate court affirmed the conviction for criminal sale of a controlled substance.[209] Some of them have further developed and added to the original guidelines of 1978.[210] These cases create the impression that the agency defense can be applied consistently and that the guidelines from 1978 do work. However, this impression is misleading.

There are other examples where the guidelines fail and courts produce widely inconsistent results in cases involving the agency defense. Perhaps the most inconsistency is found in cases where steerers receive some kind of tip from the ultimate buyer. The issue in such cases is whether the tip is evidence that the motive of the steerer was to advance his own self-interest and not the interest of his principal. If such evidence sufficiently proves this beyond a reasonable doubt, then the prosecution has successfully disproved the agency defense and the steerer is liable for sale.

Consider the following trio of cases. They are all buy and bust operations in which steerers wanted a share of the drugs as a tip from the undercover officers pretending to be ultimate buyers. In the first case, *People v. Johnson*, the defendant testified that he arranged the drug transaction in return for a share of the drugs.[211] The court ruled that a share of drugs is more than an incidental benefit and thus the defendant was not entitled to the agency defense.[212] In the second case, *People v. Coleman*, the defendant testified that he was merely assisting the undercover officer who approached him for help in

208. See People v. Norman, 715 N.Y.S.2d 802, 803-04 (N.Y. App. Div. 3d Dep't 2000).

209. See id.

210. See, e.g. Monahan, 493 N.Y.S.2d at 899 (holding that the prosecution may present defendant's prior drug convictions as proof of prior familiarity with the drug trade if a defendant plans to use the agency defense).

211. People v. Johnson, 730 N.Y.S.2d 102, 102 (N.Y. App. Div. 1st Dep't 2001).

212. Id.

obtaining cocaine.[213] He further admitted that he wanted to smoke the cocaine with the officer.[214] Despite this confession of an interest in a share of the drugs, the court ruled that there was sufficient evidence to require an instruction on the agency defense.[215] In the third case, *People v. Metuxrakis*, the defendant testified that she was a prostitute and that she obtained drugs for the undercover officer in the hope of having sex with him for money or sharing his drugs.[216] Despite this statement of self-interest, the court held that there was sufficient evidence to warrant the agency charge to the jury.[217] Inexplicably, the first court arrived at the exactly opposite conclusion of the second and third courts, despite similarity in facts.

A second factor with notable inconsistency is salesman-like behavior. Courts are not consistent with what they regard and do not regard as salesman-like behavior. Consider the following pair of cases. In the first case, *People v. Perez*, the defendant directed the undercover officer to wait by the side of the road while he retrieved the cocaine.[218] In the second case, *People v. Villacci*, the defendant agreed with the suggestion of a co-defendant that the undercover officer try a certain brand of crack cocaine and then accepted the $10 in pre-recorded buy money with which to purchase the drugs.[219] Which defendant behaved more like a salesman with a self-interest in the transaction and which defendant behaved more like a purchasing agent interested in the welfare of the undercover officer? Surprisingly, the court in the first case, *People v. Perez*, labeled the act of directing salesman-like behavior while the second court did not view the endorsement of a particular brand of crack cocaine as salesman-like touting.[220]

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213. People v. Coleman, 728 N.Y.S.2d 603, 604 (N.Y. App. Div. 4th Dep't 2001).
214. Id.
215. Id.
216. People v. Metuxrakis, 678 N.Y.S.2d 122, 123 (N.Y. App. Div. 2d Dep't 1998).
217. Id.
218. People v. Perez, 540 N.Y.S.2d 456, 457 (N.Y. App. Div. 2d Dep't 1989).
219. See People v. Villacci, 700 N.Y.S.2d 34, 35 (N.Y. App. Div. 2d Dep't 1999).
220. Compare Perez, 540 N.Y.S.2d 456, with Villacci, 700 N.Y.S.2d 34.

The inconsistency and variance in the application of the agency defense is remarkable, especially in light of the long experience of New York courts with the defense. The inconsistency appears on both the appellate and trial court levels.[221] Indeed, not only do the trial courts differ in when they give juries instructions on the agency defense, they also vary substantially in the instructions that they give.[222]

What explains the inconsistent legal precedents? Professor Abramovsky believes that part of the problem is the fact that the "[a]ppellate courts in New York have given no guidance as to the comparative weight to be given each factor."[223] He concludes his article in 1997 by imploring the Court of Appeals to set down "clear and firm guidelines for [the agency defense's] application."[224] This article argues that the underlying cause of the inconsistency is much more fundamental. Even if the Court of Appeals promulgated more definitive guidelines, that improvement would not ameliorate the falsehood of treating the fleeting interaction between steerers and ultimate buyers as a meaningful fiduciary relationship. It is this basic lack of truth that haunts the application of the agency defense.

III. CALLING FOR AN HONEST CONSIDERATION OF MOTIVE

Instinctively, the agency defense sounds laughable. Although the concept of a principal-agent relationship is not strange, it is usually associated with real estate transactions or the representation of celebrities. In

221. See Abramovsky, supra note 203, at 3 ("Application of these factors by New York trial and appellate courts . . . has resulted in inconsistent outcomes.").

222. See id. Professor Abramovsky points out one additional disparity amongst courts in New York. "Furthermore, despite the Court of Appeals' explicit holding to the contrary, some trial courts and even intermediate appellate courts have continued to treat agency as an affirmative defense." (citing the Court of Appeals opinion in People v. Roche, 379 N.E.2d at 212, and intermediate appellate opinions in People v. Satloff, 437 N.E.2d 271 (N.Y. 1982) and People v. White, 539 N.Y.S.2d 1001 (N.Y. App. Div. 2d Dep't 1989)).

223. Abramovsky, supra note 203, at 3.

224. Id.

contrast, agency is a far-fetched cry from the reality of the drug trade as plied on the streets of this country.

Part III of this article begins with a description of how drugs are actually sold on the street. Sources for this description include the efforts of journalists who interviewed numerous characters in the drug trade and in the anti-drug war and criminologists who conducted long-term studies of drug addicts. They all concur that steerers are often drug addicts themselves who are motivated into finding drugs for ultimate buyers because they are paid in money and drugs from both the buyers and the sellers. There may be a small desire to meet the interests or needs of the ultimate buyers, but it is the rare occasion in which this desire is the sole or dominant motive of the steerers.

Part III then offers an explanation for why judges created the agency defense, despite its lack in truth. As by-products of the war on drugs, the two reasons were the increasingly harsh mandatory sentencing for drug offenses and the ambivalent attitude of Americans towards drug addicts and their crimes. This article concludes with a proposal to eliminate the agency defense and to allow for the consideration of drug addiction in the discretionary decisions of the criminal justice process. Instead of using an ill-fitting commercial law concept, this proposal endorses the use of motive as a vibrant and helpful tool in the criminal law.

A. The Drug Trade on the Streets

There were an estimated 3.3 million hard-core cocaine users and 977,000 hard-core heroin users in the United States in 2000.[225] Illicit drugs are a booming global business generating annual revenues of more than $400 billion.[226] Of course, what separates the drug trade from

225. Office of Nat'l Dry Control Policy, Executive Office of the President, What America's Users Spend on Illegal Drugs: 1988-1998, at 8, 10 (2000).

226. Matthew Brzezinski, Re-Engineering the Drug Business, Busted: Stone Cowboys, Narco-Lords and Washington's War on Drugs 91 (Mike Gray ed., 2002) (citing a United Nations study) (reprinted from the N.Y. Times Magazine, June

other global industries is the fact that it is against the law. Evading the detection of law enforcement is a huge priority. Towards that end, kingpins in the drug trade adopt various strategies including the use of "specialized subcontractors or freelancers on a need-to-know basis" and "plenty of expendable intermediaries in case someone gets caught and talks."[227]

On the worldwide journey taken by two glassines of heroin,[228] the last transaction is still tremendously important. At the final stage of distribution, the setting is the street[229] and those expendable intermediaries are the steerers. One longtime user of heroin named Khamillo (pronounced "Cameo") described his work on 110th Street in Manhattan in the summer of 1996:

> Every day around noon, a hustler would approach him on 110th Street and whisper a two-digit number keyed to the city's zip codes. "Two-Nine," for instance, signified the northeast corner of Central Park. When approached by customers he considered legit, Khamillo would lead them to the park, where two or three dealers would be waiting on benches inside the entrance. After making sure Khamillo was not being followed, one of the dealers would quietly raise a finger to indicate that he had the goods. And the deal would quickly go down. Tipped a couple of dollars by both parties, Khamillo on a good day could make $20 an hour. "Demand," he observed one afternoon as junkies buzzed around him, "is as great as ever."[230]

23, 2002).

227. Id. at 92.

228. See id. at 93 ("By the time it reaches the streets of Baltimore, the world's most powerful narcotic will have traveled through half a dozen countries, soared at least 5,000-fold in price and changed hands a hundred times.").

229. See Falco, supra note 120, at 71 ("Street drug markets have spread across the country, bringing with them crime, violence, and death. In a 1991 survey, police departments in the nation's fifteen largest cities reported 1,500 drug markets . . . .").

230. Massing, supra note 2, at 253.

Khamillo is one of many, many steerers on the streets.[231] They perform a variety of functions that connect ultimate buyers to drug dealers:

> Steering, touting, and copping involve overlapping role relationships among participants in drug-distribution events. *Steerers* direct a potential customer to a dealer, who makes the sale. *Touts* locate customers for a particular dealer. *Cop men* transport money and drugs between a dealer and buyer, who rarely meet. An individual might engage in one and usually more such activities during a given day. A single transaction might involve an individual's acting as a steerer, a tout, and then a cop man.[232]

In addition to some transactions involving multiple individuals, there could even be transactions where one individual performs multiple functions:

> From the point of view of a person who wants to buy drugs, it might be difficult to distinguish a steerer (believed to be more neutral) from a tout (usually employed by the dealer to locate customers). If a potential buyer asked a subject who was steering to cop some drugs for him, the subject would typically convert to a cop man. Because these three forms of drug distribution occur frequently and are almost impossible to keep separate, we have combined them into one category in the data.[233]

Like the study in *Taking Care of Business*, this article has been using the terms *steerer* and *steering* to cover these acts as one category. After all, from the perspective of the criminal law, all these acts would be subject to prosecution on sale charges and can be defended as the acts of a purchasing agent.

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231. See Brzezinski, supra note 226, at 107 ("There are thousands of others . . . in Baltimore—and throughout inner cities across the United states—working . . . for next to nothing, for a lack perhaps of economic alternatives.").

232. Johnson, supra note 106, at 63.

233. Id.

In addition to the use of intermediaries, these simple street sales of modest amounts of drugs are also marked by the fact that the steerers and the ultimate buyers are strangers to one another. The lack of familiarity makes sense because the identities of the steerers and the locations of the suppliers are always changing in order to avoid law enforcement. Moreover, in the interest of all the participants, such sales happen very quickly. As one author described, "Street drug markets attract 'drive-through' buyers from wealthier neighborhoods, particularly the suburbs. Deals are completed in a matter of seconds with little personal contact."[234]

Although practical, the lack of familiarity and quickness become liabilities later on at trial when a steerer is trying to present a reasonable view of the evidence that he was a procuring agent for the ultimate buyer. Why would the steerer undertake the risks of an illegal activity on behalf of his alleged principal, a complete stranger? What kind of principal-agent relationship can be formed between two complete strangers in a matter of minutes?[235]

Prosecutors are correct that the reason why defendants engage in steering is not because of some principal-agent relationship with the ultimate buyers. Rather, the reason is much more self-interested and desperate. As numerous studies have concluded, the most common motive for criminal behavior is that defendants are drug addicts.[236] In particular, they commit drug offenses.[237] The drug trade is attractive because they are

234. Falco, supra note 120, at 72.

235. In prosecuting buy-and-bust operations, prosecutors often point to the fact that the steerer defendant and the undercover officer were complete strangers to disprove an alleged agency defense. See, e.g. People v. Vasquez, 724 N.Y.S.2d 406, 407 (N.Y. App. Div. 1st Dep't 2001).

236. In New York City, in 2002 81 percent of the adult male arrestees tested had positive results for at least one type of illegal drug. The most prevalent drug was cocaine. See Arrestee Drug Abuse Monitoring Program (ADAM) Annualized Site Report for Manhattan, New York. In the country, in 2000 more than half the test sites reported at least 64 percent of adult male arrestees had recently used an illegal drug. See National Institution of Justice, U.S. Department of Justice, Arrestee Drug Abuse Monitoring 2000 Annual Report 1 (2003).

237. In New York City, in 2002 91 percent and 92 percent of male and female

paid in money and drugs by both buyers and sellers. Steerers steer to support their drug habits. Michael Massing explains how the use of drug addicts to steer and indeed sell drugs makes a lot of economic sense. "Ultimately, though, the most ready means of raising money for drugs is to sell them. . . . Drug gangs are always on the lookout for new pitchers, and, given the high risk of arrest, addicts are often the only candidates around."[238] The promise of a "free" high and money is all a drug addict needs.[239]

Very little of a steerer's motive has to do with fulfilling the needs of a principal. Some even believe that very little of a steerer's motive has to do with making money, at least not for money's sake.[240] What is the end result of this sad reality of drug trafficking on the streets? The massive war on drugs has resulted in the arrests and convictions of drug addicts supporting their habits by steering and selling drugs.[241] Their numbers are overwhelming, with the annual number of drug offenders admitted to the New York State prison system growing from 470 in 1970 to 8,521 in 1999.[242]

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adults who were arrested for drug offenses and tested for drugs had positive test results. See Arrestee Drug Abuse Monitoring Program (ADAM) Annualized Site Report for Manhattan, New York.

238. Massing, supra note 2, at 69-70.

239. See id.

240. "The public stereotype of a drug seller—someone who sells drugs that he does not use or seldom uses—is rarely found among research subjects. Most research shows that persons tend to sell drugs they use quite frequently and that the earnings from such dealings are generally used to support their drug consumption." Johnson, supra note 106, at 61.

241. Eleven percent of the federal drug-trafficking defendants are classified as major traffickers, and more than half are low-level offenders. See Jim Dwyer, Casualty in the War on Drugs, in Busted: Stone Cowboys, Narco-Lords and Washington's War on Drugs, supra note 226, at 159, 162.

242. See New York State Division of Criminal Justice Services, 1999 Crime & Justice Annual Report Contributing Agency Reports, available at http://criminaljustice.state.ny.us/crimnet/ojsa/cja_99/sec7/docs-drg.htm (last visited Dec. 7, 2004).

B. Harsh Sentences

If steerers are not motivated by an interest in their principals' well-being, then why did courts create the agency defense? And why do the New York courts continue to apply it? And why does the New York State legislature continue to allow them? The answer to these legitimate questions is a confluence of several different reasons. The first is the harsh and mandatory nature of criminal sentencing, especially as it pertains to drug offenses. The second is the need for an alternative to the addiction defense. The third is the failure of the criminal law to accommodate the role of motive with broader acceptance and greater flexibility.

New York State's notorious sentencing laws for drug offenders are among the harshest in the country. Known as the Rockefeller Drug Laws, they were passed in 1973 and signed into law by then Governor Nelson Rockefeller. Only a few years earlier, President Nixon had declared the war on drugs and New York State, particularly New York City, was steeped in drugs, crime and fear.[243] As a first response, Governor Rockefeller had tried to establish residential treatment centers and methadone clinics for addicts, but they were expensive and did not reduce crime.[244] A frustrated Governor Rockefeller then turned to the "lock them up and throw away the key" approach[245] and even admitted that he endorsed this dramatic increase in penalties because he simply did not know what else to do.[246]

As a result of the original Rockefeller laws, a first-time offender convicted of selling more than two ounces of heroin in New York faced a mandatory minimum of fifteen years

243. "Fear begets intolerance. People and the politicians they elect are more willing to put up with severe penalties for relatively minor drug offenses when crime rates are high, as it was in New York City in the late 1960's and early 1970's, the period that produced the Rockefeller laws. At the time, heavy heroin use in the city was widely blamed for rapidly increasing property crime." McKinley, supra note 125, at A29.

244. See id.

245. Id.

246. See John Caher, Reform of Rockefeller Drug Laws Unlikely, N.Y.L.J., June 8, 2000, at 1.

to life.[247] A first-time offender convicted of selling any amount of heroin faced a mandatory minimum of one to three years to fifteen years to life.[248] Thus, even upon the first conviction, steerers faced substantial jail terms that only increased with every repeat conviction. What was startling about the Rockefeller Drug Laws is that these sentences were both high and mandatory.[249] While there were often plea negotiations that could reduce the offense and the sentence, these were not guaranteed.[250] They also did not change the disturbing fact that a defendant who exercised his constitutional right to go to trial and ended up convicted received a harsh mandatory minimum.[251]

The original Rockefeller Drug Laws had a stark impact. In 1997, the state prison population in New York was nearly 70,000 people, a figure that is more than *five* times the number in 1973.[252] Although these sentencing laws have survived constitutional challenges that they constitute cruel and unusual punishment,[253] opponents of the Rockefeller Drug Laws still denounced them as disproportionate.[254] They made two common comparisons. First, a fifteen-year-to-life sentence is the same sentence that a first-time offender in New York would receive for

247. See infra note 16.

248. See id.

249. See Bob Herbert, The Ruinous Drug Laws, N.Y. Times, July 18, 2002, at A21 ("The essential problem with the Rockefeller laws is that the punishments are both draconian and mandatory.").

250. See Paul Schechtman, A Good Deal for Criminal Justice, N.Y.L.J., Mar. 20, 1997, at 2 ("Many defendants arrested for possessing four ounces of cocaine are offered plea bargains that permit them to plead guilty to class A-2 felonies and to face as little as 3 years in prison. Indeed, the availability of shock incarceration, work release, and other diversion programs means that such defendants can serve only six months in prison before being released.").

251. See id. ("Sadly, it is the defendant who rejects that bargain—who has the temerity to exercise her constitutional right to trial—who faces the full weight of the Rockefeller drug laws.").

252. See Massing, supra note 2, at 256.

253. See People v. Broadie, 332 N.E.2d 338 (1975), cert. denied 423 U.S. 950 (1975).

254. See, e.g. Herbert, supra note 249, at A21 ("There is no way to justify sentencing nonviolent low-level drug offenders to prison terms that are longer than those served by some killers and rapists.").

intentional murder and almost double the sentence a first-time rapist would receive.[255] Second, a steerer with no prior record convicted in federal court faces thirty-three to forty-one *months* for selling two ounces of heroin and twenty-one to twenty-seven *months* for selling two ounces of cocaine.[256] In order to receive a fifteen-year sentence, a federal defendant would have to sell more than ten kilograms of heroin or fifty kilograms of cocaine.[257]

Despite these astonishing comparisons, an odd alliance of reform activists was unable to overcome the powerful economic and political interests of legislators supporting these draconian sentences.[258] Finally, thirty-one years after the passage of the Rockefeller Drug Laws, the New York State legislature acceded in December 2004 to the increasingly loud demands for reform and reduced the harsh mandatory minimums.[259] Today, a first-time offender who sells more than two ounces of heroin in New York faces a sentence of eight to twenty years in prison and a first-time offender who sells any amount of heroin in New York faces a sentence of one to one-and-a-half years in prison.[260] While notable, these reductions are only the tip of the iceberg as reform activists continue their fight against mandatory sentencing.[261]

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255. See, e.g. Shechtman, supra note 250, at 2.

256. See id. (explaining that these sentencing calculations assume that the defendant is convicted after trial and that federal sentencing guidelines would only impose twenty-four to thirty months for two ounces of heroin and twelve to eighteen months for two ounces of cocaine if the defendant pled guilty instead).

257. See id.

258. This alliance included various judges on the Court of Appeals, parents of imprisoned drug offenders, civil rights groups concerned with the racial implications, celebrities and even some corrections associations. See John Caher, Clemency Granted to Rockefeller Drug Inmates, N.Y.L.J., Dec. 26, 2000, at 1. They charged that state legislators, especially from upstate New York, were reluctant to change the sentencing laws because their local constituents relied on prisons for their economic livelihood and because the prisoners themselves were included in crucial population counts for drawing their legislative districts, even if the prisoners could not vote as felons. See Brent Staples, Why Some Politicians Need Their Prisions to Stay Full, N.Y. Times, Dec. 27, 2004, at A16.

259. See Elizabeth Benjamin, New Drug Laws Signed, Times Union, Dec. 15, 2004, at B3.

260. See infra note 16.

261. See Leslie Eaton & Al Baker, Changes Made to Drug Laws Don't Satisfy Advocates, N.Y. Times, Dec. 9, 2004, at B1.

C. Ambivalence about Addiction

If there is no room to accommodate drug addicts who steer for a living in sentencing, then the liability stage is an option. Harsh and mandatory sentences for drug offenses would pose less of a problem if there were ways through which low level offenders such as steerers could escape criminal liability. Such steerers share the same motive as the ultimate buyers yet their moral culpability is greater. Earning a living through selling drugs to other addicts is more reprehensible than making an honest living. The difference, though, is much less than the difference in penalties between misdemeanor possession and felony sale charges. But if rigid and politically intractable sentencing guidelines are part of the problem, perhaps defenses to liability offer a solution.

Defendants have tried to offer a simple addiction defense where they contend that their drug addictions should serve as a defense to their crimes. For example, in *United States v. Moore*, the defendant claimed that he was not responsible for his possession of heroin because he was a drug addict with an overpowering need to use the drug.[262] He tried to equate his loss of control due to addiction with the loss of control in a duress defense. He was coerced into possessing the heroin by his addiction, rather than by a threat of death.[263] The D.C. Court of Appeals rejected his defense on the grounds that the duress defense does not extend to every cause of loss of self-control.[264] The problem with addiction as a defense is that it is not "a confirmable disability that adequately distinguishes the [defendant] from the general populace."[265] A defendant's claim that he

262. See United States v. Moore, 486 F.2d 1139 (D.C. Cir. 1973), cert. denied, 414 U.S. 980 (1973).

263. See id. at 1178 (quoting from defendant's brief).

264. See id. at 1179-80.

265. Robinson, supra note 105, § 177(e)(7), at 364 ("The less objective and less confirmable nature of psychological addiction makes it more difficult to distinguish the psychologically addicted actor from others in the population, and thus makes it more difficult to limit the precedential effect of his acquittal. Similarly, such a less definite disability offers less confirmation of the existence of

is unable to refrain from his offense because of addiction is not verifiable and a defense must be "both gross and verifiable" to excuse criminal liability.[266]

Likewise, in the 1968 case of *Powell v. Texas*,[267] the Supreme Court declined 5-4 to overturn a conviction for public drunkenness on the grounds that the defendant suffered from chronic alcoholism.[268] This case was a transparent attempt[269] to test the controversial holding of an earlier Supreme Court case, *Robinson v. California*, where the Court had struck down as unconstitutional a criminal statute that punished the status of being an addict.[270] As Professor Greenawalt describes, *Robinson* left open the question, "[i]f it is unconstitutional to punish someone for suffering from a disease, can it be constitutional to punish him for acts that are caused by the disease?"[271]

Without success, Powell tried to argue that an affirmation of his conviction would also constitute cruel and unusual punishment in violation of the Eighth Amendment.[272] In the plurality opinion, the Supreme Court worried about the ramifications of a constitutional principle that forbids the punishment of conduct that is in some sense compelled by addiction. "If Leroy Powell cannot be convicted of public intoxication, it is difficult to see how a State can convict an individual for murder, if that individual, while exhibiting normal behavior in all other respects, suffers from a 'compulsion' to kill, which is an 'exceedingly strong influence,' but 'not completely overpowering.'"[273] Although the dissenters proposed a line of demarcation that would allow addiction to be a defense only to conduct which is "a characteristic and involuntary

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the impairment of control required to establish the excusing condition.").

266. Moore, 486 F.2d at 1183-84.

267. Powell v. Texas, 392 U.S. 514 (1968).

268. See id. at 537.

269. See id. at 522.

270. See Robinson v. California, 370 U.S. 660, 668 (1962).

271. Kent Greenawalt, "Uncontrollable" Actions and the Eighth Amendment: Implications of *Powell v. Texas*, 69 Colum. L. Rev. 927, 929 (1969).

272. Powell, 392 U.S. at 517.

273. Id. at 534.

part of the pattern of the disease,"[274] the plurality refused to issue a constitutional principle of mens rea or even voluntariness.[275]

Both *United States v. Moore* and *Powell v. Texas* feature long discussions of whether drug addicts should be excused for criminal acts that are motivated by their addictions. Both conclude for different reasons that they should not. While the D.C. Court of Appeals rejects addiction as an unverifiable claim, the Supreme Court is concerned about the inability to place principled limits on such an excuse. Underlying their reasoning is the American ambivalence about the nature of addiction and the moral culpability of addicts.

Indeed, scattered throughout their opinions are descriptions of the latest studies on addiction. Are addicts suffering from an uncontrollable disease that attacks them psychologically and/or physiologically?[276] Or are addicts morally culpable actors who have some control over their acts? Did the addicts make bad choices in getting addicted in the first place? Do they also then make punishable choices in steering drugs to support their habits?

American attitudes, studies, and politics have been all over the map on these very questions. As a result, American criminal law and drug policies have vacillated between treating drug addicts as hardened criminals[277] or as sympathetic bearers of a disease who need treatment. They seem to mimic the cycles of crime waves and economic booms and busts. Logically, they also follow the pendulum swings between utilitarianism and retributivism in the criminal law.

It was in the midst of one of these swings that the agency defense came to life and has continued to survive.

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274. Id. at 559 n.2 (Fortas. J., dissenting).

275. See id. at 535-36.

276. See Robinson, supra note 105, § 194(c), at 456 (theorizing that physiological addictions are much more effective and accepted as excuses than psychological addictions).

277. See, e.g. Massing, supra note 2, at 85-86 ("Ever since passage of the Harrison Narcotics Act in 1914[,] . . . Americans had come to view addicts as dangerous deviants who had to be isolated from society.").

Because legislatures had foreclosed sentence reductions and courts had rejected straightforward addiction defenses, steerers seized upon this commercial law concept for a way past their sale charges. They did so even though there was very little truth in the claim that they were purchasing agents for their ultimate buyers. The agency defense received the endorsement of the Court of Appeals, trial judges, and jurors because almost from its beginning all these decision makers in the criminal justice system realized the power of the agency defense. Through it, they are able to acquit those sympathetic steerers who were driven into the drug trade only to support their own habits on the heinous sale charges. They achieve proportionate justice, even if indirectly. Judicially created and protected, the agency defense is the only politically viable option for accommodating sympathetic motives of drugs addicts who steer.

D. The Proposal for Motive-Sensitive Sentencing

While valuable, the agency defense does come with a cost. As explained in part II, courts use numerous factors in trying to assess whether a reasonable view of the evidence would support the status of purchasing agent. The guidelines espoused by the Court of Appeals are not definitive or rigid. Instead, the Court of Appeals urges trial courts and jurors ultimately to use their common sense. As a result of this freedom and the inherent falsity of a principal-agent relationship, courts are inconsistent in what they regard as salesman-like behavior or an incidental tip versus a substantial self-interest. Trial judges and jurors appear to predetermine which steerers deserve to escape liability from sale and interpret the evidence towards that end.

The lack of consistency and the use of a legal fiction are costly. If a defendant was obviously steering drugs for his own drug problem, then the trial judge will likely grant a request for instructions on the agency defense and submit the question to the jury. More often than not, the jury will

be relieved to have some lawful option that avoids a harsh sentence for the sympathetic defendant, even if that option is purely a legal fiction. However, what is unseen are all those defendants whose criminal acts are also motivated by drug addictions whose requests for jury instructions are denied or whose juries are not sufficiently persuaded of their agent status. Because they were unable to present an honest plea based on evidence of their addictions, they are most likely convicted of sale charges and receive Rockefeller drug sentences. The inconsistency in the application of the agency defense leads to an unacceptable inequality of justice.

Perhaps some observers support the agency defense because it is an option that allows for some sanity and some proportionate justice for some drug offenders in New York State. However, like any other unnecessary legal fiction, over time its existence and application undermines the normative power of the criminal law. It achieves its justice in an underhanded and untruthful manner. Participants in the criminal justice system, ranging from defendants to undercover police officers to jurors, lose their respect for the rule of law and believe that it can be manipulated by whoever is in power. This article proposes an alternative to the agency defense.

This alternative is to reform the way that motive is regarded in the criminal law and to mandate more open and direct consideration of motive in decisions. For the problem of the steerer and the simple street sale, the relevant forums to consider motive are the discretionary forums of charging, plea bargaining, and sentencing. Because drug addiction does concededly have low provability and ever-changing moral potency, it should not be an outright defense from criminal liability. Convictions are the moral condemnations of a community, and thus only highly provable and morally potent motives such as self-defense should lead to acquittals.

One particular effectuation of this proposal would be to reform the sentencing rules such that judges must evaluate the motives of a defendant convicted of sale. The motives

of the defendant can be one of many factors that a judge considers. If the judge believes that such motives are deserving of a reduction in sentence, the judge should have a wider range of possible sentences from which to choose. This range can include treatment as well as imprisonment. Unlike many current demands to reform the notorious Rockefeller drug laws in New York State, this proposal is not necessarily seeking to replace jail terms with long-term drug rehabilitation programs or to reduce the length of jail terms for *all* criminal sale convictions.[278] What this proposal does seek is mandatory consideration of motives by judges as a sentencing factor and greater flexibility for judges in selecting an appropriate sentence to match their assessments.

In addition to achieving more proportional justice, this proposal will restore credibility and greater transparency to the criminal justice system. It will not undermine the need for effective social control and it will accommodate addiction's low provability and ambivalence about moral culpability issues. Finally and perhaps most importantly, it will be one step closer towards bringing motive into the criminal law where it belongs.

278. Those may also be worthwhile improvements; however, they are outside the scope of this article.